

10959-0001/dmf

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

GUY T. MITCHELL,

AFFIRMATION

Plaintiff,

08 CIV 4319 (JES)

-against-

CARBON CAPITAL II, INC.,

Defendant.

-----x

PHILLIP SHATZ, an attorney duly admitted to practice before this Court, hereby affirms that the following is true and correct:

1. I am an attorney admitted to practice before this Court, am Of Counsel to the law firm of McCabe & Mack LLP, counsel for the Involuntary Plaintiff, Royal Palm Senior Investors, LLC ("Involuntary Plaintiff"). I submit this Affirmation in Opposition to Defendant Carbon Capital II, Inc.'s Motion to Dismiss.

2. On October 23, 2007, the Supreme Court of the State of New York, County of New York (the "State Court"), in connection with the action entitled *Hotel 71 Mezz Lender, L.L.C. v. Falor, et al.*, No. 601175/07 (Ramos, J.) (the "*Hotel 71 v. Mitchell State Action*"), attached Mitchell's interests in limited liability companies that were previously levied upon by the New York County Sheriff. A true and correct copy of the Order of Attachment is attached hereto as Exhibit 1.

3. On March 26, 2008, the State Court granted Hotel 71 Mezz Lender, L.L.C.'s motion to appoint former New York Court of Appeals Judge Albert M. Rosenblatt as receiver (the "Receiver" or "Receiver Rosenblatt") over all of the personal property of Mitchell (and

10959-0001/dmf

the other judgment debtors), including all of the contractual rights and membership interests that they own in certain limited liability companies and other entities. True and correct copies of orders dated April 2 and April 4, 2008 regarding the receivership are attached hereto as Exhibits 2 and 3, respectively.

4. On June 16, 2008, the State Court held a hearing in the *Hotel 71 v. Mitchell State Action*. A true and correct copy of the transcript of the June 16, 2008 hearing is attached hereto as Exhibit 4.

5. A recent article in *The Deal* stated that “The [Royal Palm Hotel] is on the block, although it isn’t clear who owns it” and further that “exactly who owns the Royal Palm is in dispute” because an “affiliate of BlackRock Inc. [i.e., Carbon], which holds a loan for the property it says is in default, wants control,” but “Mitchell has resisted” and “[l]awsuits have flown.” A true and correct copy of the June 3, 2008 article in *The Deal* is attached hereto as Exhibit 5.

6. On March 25 and April 1, 2008, Carbon sent RPSI letters notifying RPSI that Carbon deemed RPSI in default of the Settlement Agreement. True and correct copies of the March 25 and April 1, 2008 letters are attached hereto as Exhibits 6 and 7, respectively.

7. On June 10, 2008, in connection with this action, Carbon deposed Plaintiff Guy T. Mitchell. A true and correct copy of the transcript of this deposition is attached hereto as Exhibit 8.

DATED: Poughkeepsie, New York
August 1, 2008


PHILLIP SHATZ

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

HOTEL 71 MEZZ LENDER, L.L.C.,

Plaintiff,

v.

ROBERT D. FALOR, DAVID FALOR, CHRIS M.
FALOR, JENNIFER FALOR, GEOFFREY L.
HOCKMAN, and GUY T. MITCHELL,
Defendants.

x

023027

Hon. Charles E. Ramos

Index No. 601175/07

Commercial Part

[PROPOSED] ORDER OF
ATTACHMENT

x

SUPREME COURT	STATE OF NEW YORK
APPLIED	ED
COMMERCIAL PART	VISION OFFICE
<input checked="" type="checkbox"/> MOT	<input type="checkbox"/> X-MOT
CLERK'S INITIALS	

(Signature)

TO THE SHERIFF OF ANY COUNTY OF THE STATE OF NEW YORK OR OF THE
CITY OF NEW YORK:

Whereas an application has been made to the undersigned by Plaintiff, Hotel 71 Mezz Lender, L.L.C. ("Plaintiff"), for an Order of Attachment against the property of each of the defendants, Robert D. Falor, David Falor, Chris M. Falor, Jennifer Falor, Geoffrey L. Hockman and Guy T. Mitchell ("Defendants"), in an action in the Supreme Court, now INDEX NUMBER 601175, filed the affidavit of Ambrose J. Fisher, duly sworn to on September 18, 2007, and the exhibits annexed thereto; the affirmation of Robert L. Weigel, Esq., duly sworn to on September 19, 2007, and the exhibits annexed thereto; the Memorandum of Law in Support of Plaintiff's Ex Parte Application for an Order of Attachment; and it satisfactorily appearing to the Court from the affidavit and affirmation that one of the grounds for attachment set down in CPLR § 6201 exists in favor of Plaintiff, and against the Defendants, to recover a sum of money, that is, the sum of \$57,411,864.33 (which is the amount calculated to be due and owing, jointly and severally, by the Defendants as of September 18, 2007) to recover damages for breach of contract on the Defendants' personal guaranty obligations, that Plaintiff is entitled to recover that

sum over and above all counterclaims known to them, and that each of the Defendants is a nondomiciliary residing outside of the State of New York – defendants Robert Falor, David Falor, and Chris Falor are all nondomiciliaries who reside in Florida; defendant Jennifer Falor is a nondomiciliary who resides in Illinois; defendant Geoffrey Hockman is a nondomiciliary who resides in Michigan; and defendant Guy Mitchell is a nondomiciliary who resides in Florida, and the Plaintiff having given an undertaking with corporate surety in the amount of \$ 10,000,000.
it is, therefore,

On motion of Gibson, Dunn & Crutcher LLP and Akin Gump Strauss Hauer & Feld LLP, attorneys for the Plaintiff,

ORDERED that an Order of Attachment be and the same hereby is granted, and it is further

ORDERED, that the amount to be secured by this order of attachment, including any interest, costs, and sheriff's fees and expenses shall be \$65,149,926.00 (\$57,411,864.33 (the amount calculated to be due and owing, jointly and severally, by the Defendants as of September 18, 2007)).

Now, you are commanded to levy within your jurisdiction at any time before final judgment, upon such property in which any of the Defendants has an interest and such debts owing to Defendants, including, but not limited to, any interest any of the Defendants may have in any of the companies or entities listed on the attached **Rider A**, and for the purpose of securing and satisfying the sum of \$57,411,864.33, and that you proceed hereon in the manner and make your return within the time prescribed by law.

It is further ORDERED that the garanishee's statement required by CPLR § 6219 be served within five days after levy, that a copy of the garanishee's statement be served upon the

plaintiff, and that the plaintiff shall move within 10 days after levy for an order confirming this

~~and it is ORDERED that the plaintiff's undertaking be and the same is hereby~~
order of attachment, fixed in the sum of \$ ~~10,000.00~~, conditioned that the plaintiff shall
pay to the defendant an amount not exceeding \$ ~~10,000.00~~ for legal costs and damages which
may be sustained by reason of the attachment, and up to and not exceeding \$ ~~50,000.00~~ to the Sheriff
for allowable fees, if the defendant recovers judgment or if it is decided that the plaintiff is not
entitled to an attachment of the property of the defendants, ~~as follows~~

ENTERED:

J.S.C.
Charles E. Ramon

9/25/07

Attorneys for Plaintiff:

John W. Berry
AKIN GUMP STRAUSS HAUER & FELD LLP
590 Madison Avenue
New York, New York 10022
(212) 872-1000

Robert L. Weigel
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, New York 10166-0193
(212) 351-4000

DO NOT POST

JSC

RIDER A

Royal Palm Manager, LLC
Royal Palm Hotel Property LLC
Royal Palm Hotel Senior Investors LLC
Royal Palm Senior Investors, LLC
Royal Palm Hotel Junior Investors LLC
Royal Palm Junior Investors, LLC
Royal Palm Hotel Investors LLC
Royal Palm Investors, LLC
Royal Palm Hotel Employers, LLC
MSD Investment Co., LLC
Mitchell Hotel Group LLC
Molinar Buildings LLC
Grove One Realty LLC
Grove One Management LLC
Airport North Business Center LLC
Pointe South Shopping Center LLC
Tri-County Shopping Center LLC
Virginia Station Shopping Center LLC
Red Oak Shopping Center LLC
Salem Crossing Shopping Center LLC
Salem Crossing (Phase 2) Shopping Center LLC
Mountain Valley Holdings of Georgia LLC
MHG Casa Madrona Hotel LLC
Readhouse Investors LP
Read House Investors, LP d/b/a The Read House Hotel
Pinecrest Properties Inc.
The Falor Companies, Inc.
The Falor Companies, LLC
Allied Hospitality Group, Inc.
Cypress Creek Associates, LLC
Printers Row, LLC
Printers Row Investors, LLC
Printers Row Manager, LLC
Printers Row Employer, LLC
South Beach Breakwater, LLC
South Beach Hotel Investors, LLC
South Beach Investors, LLC
South Beach Manager, LLC
Breakwater Condominium Association, Inc.
BRFLMF, LLC
BRFLMF JET, LLC
Any entity known as or d/b/a "Casa Madrona Hotel & Spa"
Cheeca Holdings, LLC
Cheeca Lodge Investors, LLC

Cheeca Lodge Manager, LLC
CD General Partnership
CD Cheeca General Partnership
Cheeca Hotel, LLC
Collinsville Holiday Inn
Empire Realty Investors, L.P.
Empire Realty Investors Express, L.P.
EWD Solutions, LLC
Grand Companies
Grand Hotel Supply, LLC
Grand Hotel and Restaurant Supply, LLC
Grand Rapids AFG Comfort, LLC
Melbourne Beach Hotel Investors, LLC
Melbourne Hotel Investors, LLC
Melbourne Hotel Manager, LLC
Melbourne Management Group, LLC
JBD Allied, LLC
Johnson Resort Properties d/b/a Key West Courtyard
Lansing AFG Hampton, LLC
Mayfair Hotel Group, LLC
Mayfair House Hotel, LLC
Mayfair Hotel Property Investors, LLC
Mayfair Hotel Investors, LLC
Mayfair Hotel Manager, LLC
National DF Investments, LLC
Nationwide Discount Hotel Supply, Inc.
Nationwide Hotel Management, Inc.
Nationwide Restaurant Industries, Inc.
PFI Holdings, LLC
PFI Holdings 1, LLC
Robert Falor Investments, LLC
Chicago H&S Hotel Property, LLC
Chicago H&S Investors, LLC
Chicago H&S Senior Investors, LLC
Chicago H&S Junior Investors, LLC
Chicago H&S Hotel Manager, LLC
Chicago H&S Manager, LLC
H & S Manager, LLC
Hotel 71 Management Group, LLC
Chicago H&S Hotel Employer, LLC
Hotel 71 Mezz Lender, LLC
Chattanooga Hotel Group, LLC
Chattanooga Hotel Investors, LLC
Chattanooga Hotel Manager, LLC
Chattanooga Hotel Management, LLC
CH Management Group, LLC

CD Chattanooga General Partnership
Springfield Inn Limited Partnership d/b/a The Springfield Inn
Tech Motel Ltd d/b/a Read House Hotel
The Tides, LLC
Tides Hotel Property, LLC
Tides Investors, LLC
Tides Hotel Investors, LLC
Tides Manager, LLC
Tides Hotel Employer, LLC
Trident-Allied Associates, LLC
State Street Hotel, LLC
202 S. State, LLC
State Street Hotel Investors, LLC
State Street Hotel Manager, LLC
U.S.A. Hotel Supply, Inc. d/b/a Grand Companies

Index No. 601175/07
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

HOTEL 71 MEZZ LENDER, L.L.C.,

Plaintiff,

v.

ROBERT D. FALOR, DAVID FALOR, CHRIS M.
FALOR, JENNIFER FALOR, GEOFFREY L.
HOCKMAN, and GUY T. MITCHELL,

Defendants.

ORDER OF ATTACHMENT

GIBSON, DUNN & CRUTCHER LLP

Attorneys for Plaintiff

200 PARK AVENUE
NEW YORK, NY 10166-0193
(212) 351-4000

To , Esq.,

Attorney for

Due and proper service of a copy
of the within is hereby admitted

PRESENT: Ramirez
Justice

PART S3m

Hotel 71 Mezz Lender

- v -

Robert D. Falor et al.

INDEX NO.

601175/07

MOTION DATE

MOTION SEQ. NO.

026

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits

Answering Affidavits – Exhibits

Replying Affidavits

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Conditioned upon the entry of judgment, which this Court is informed is imminent, the motion for the appointment of a receiver is granted. The Defendants' refusal to produce documents related to their finances and their refusal to appear at depositions as ordered by this Court warrant the requested relief.

Accordingly, this Court hereby appoints Albert M. Rosenblatt, of 63 Washington Street, Poughkeepsie, NY 12602 (tel. 845-486-6800) to serve as the receiver in this matter and to take such actions as are appropriate to satisfy the outstanding Order of Attachment and the Judgment (or Judgments) to be entered herein against the defendants Guy Mitchell, Robert Falor, Chris Falor, Geoffery Hockman and David Falor. To the extent the interests of these defendants are the controlling interests in entities owning real estate outside of this jurisdiction, the Receiver is hereby authorized, if he is so advised, to seek the aid of the Courts of those States in which the real estate is located in executing the duties of this receivership.

This shall constitute the decision and order of this Court.

Dated: 4/2/08

JP

J.S.C.

Check one: FINAL DISPOSITION

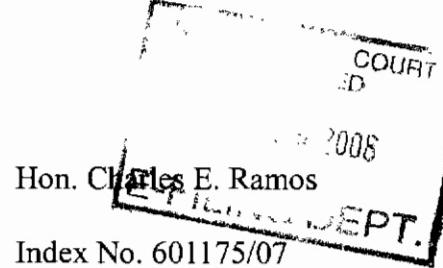
NON-CHARLES E. RAMOS
 NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

HOTEL 71 MEZZ LENDER, L.L.C.,)
Plaintiff,)
- against -)
ROBERT D. FALOR, DAVID FALOR, CHRIS)
M. FALOR, JENNIFER FALOR, GEOFFREY)
L. HOCKMAN, GUY T. MITCHELL and AMY)
MITCHELL,)
Defendants.)
)



Commercial Part

FILED

APR 07 2008

COUNTY CLERK'S OFFICE
NEW YORK

Supplemental

~~REvised PROPOSED ORDER~~

Plaintiff Hotel 71 Mezz Lender, LLC, by its attorneys Akin Gump Strauss Hauer & Feld LLP and Gibson, Dunn & Crutcher LLP, having commenced an action against the above-named Defendants and having moved this Court for an Order against Defendants Guy Mitchell, Robert Falor, Chris Falor, Geoffrey Hockman and David Falor (the "Defendants") under CPLR §§ 3126 and 5228 to appoint a receiver authorized (i) to take any appropriate actions designed to satisfy the Order of Attachment entered by this Court on September 25, 2007 and each and every judgment entered or to be entered in this action, including, but not limited to, gaining access to the relevant books and records relating to these Defendants' various entities and causing compliance with the Court-ordered discovery, and (ii) to administer, collect, improve, lease, repair or sell any ownership or management interests that Defendants Guy Mitchell, Robert Falor, Chris Falor, Geoffrey Hockman and/or David Falor have in the personal property specified below, and the motion having regularly come on to be heard,

NOW, upon reading and filing the order to show cause dated March 19, 2008, the affidavit of Robert L. Weigel, in support of the motion, sworn to on the 18th day of March, 2008, all the papers and proceedings heretofore had herein, and upon the affidavit of Stephen P. Younger, in opposition to the motion, sworn to on the 25th day of March, 2008, and upon the affidavit of Gerald Padian, in opposition to the motion, sworn to on the 25th day of March, 2008, and after hearing Robert L. Weigel, Esq., of counsel for Plaintiff Hotel 71 Mezz Lender, LLC, in support of the motion, and Stephen P. Younger, Esq., of counsel for Defendant Guy Mitchell, and Gerald Padian, of counsel for Defendants Robert Falor, Chris Falor, Geoffrey Hockman and David Falor in opposition thereto, and Nicholas P. Crowell, Esq., of counsel for judgment creditor Carbon Capital II, Inc., and after due deliberation having been held thereon,

NOW, upon motion of Gibson, Dunn & Crutcher LLP, attorney for Plaintiff Hotel 71 Mezz Lender, LLC, it is

ORDERED, that upon the entry of Judgment in favor of Plaintiff against Defendants Guy Mitchell, Robert Falor, Chris Falor, Geoffrey Hockman and David Falor, the motion be and the same is hereby ~~in all respects~~ granted, and that the Honorable Albert M. Rosenblatt, 63 Washington Street, Poughkeepsie NY, 12602, be and is hereby appointed Receiver of all of the personal property of Defendants Guy Mitchell, Robert Falor, Chris Falor, Geoffrey Hockman and David Falor, and each of them, identified in paragraphs (a) through (e), inclusive, of this Order, and authorized (i) to take any appropriate actions designed to implement, satisfy and enforce the Order of Attachment entered by this Court on September 25, 2007 and any judgment entered or to be entered in this action pursuant to this Court's Order granting summary judgment against Defendants Guy Mitchell, Robert Falor, Chris Falor, Geoffrey Hockman and David Falor dated February 6, 2008 (hereinafter the "Judgment"), including, but

not limited to, obtaining possession of and otherwise exercising dominion and control of all books and records of any type or nature relating to or evidencing the Defendants' interests in the "Receivership Property" (as defined below), causing compliance by Defendants with all Court-ordered discovery, and (ii) to administer, collect, improve, lease, manage, repair or sell any and all personal property in which Defendants Guy Mitchell, Robert Falor, Chris Falor, Geoffrey Hockman and David Falor have or claim any right, title, interest, claim and/or estate and any and all personal property in which Defendants Guy Mitchell, Robert Falor, Chris Falor, Geoffrey Hockman and David Falor have or claim any rights to manage or direct the conduct of, whether as an owner, member, managing member, partner, president, shareholder, manager or otherwise, including:

- (a) the ownership and/or management interests of Defendant Guy Mitchell in Mitchell Hotel Group, LLC, Royal Palm Junior Investors, LLC, Royal Palm Investors, LLC, Royal Palm Senior Investors, LLC, Royal Palm Hotel Property, LLC, Royal Palm Manager, LLC, The Mitchell Companies, LLC, Mitchell Hospitality Investments, LLC, Molinar Buildings, LLC, GAM Holdings, LLC, GAM Investments, Ltd., Grove One Realty, LLC, Grove One Realty, Inc., Grove One Management, LLC, PBH Lake Worth Resort, LLC, Airport North Business Center, LLC, Virginia Station Shopping Center, LLC, Red Oak Shopping Center, LLC, Salem Crossing Shopping Center, LLC, Salem Crossing (Phase II) Shopping Center, LLC, Mountain Valley Holdings of Georgia, LLC, MHG Casa Madrona Hotel, LLC, Pointe South Shopping Center, LLC, and Tri-County Station Shopping Center, LLC (collectively the "Guy Mitchell Entities");
- (b) the ownership and/or management interests of Defendant Robert Falor in Royal Palm Investors, LLC, Royal Palm Manager, LLC, Chattanooga Hotel Investors,

LLC, Chattanooga Hotel Manager, LLC, Cheeca Lodge Investors, LLC, Cheeca Lodge Manager, LLC, Chicago H&S Investors, LLC, Chicago H&S Manager, LLC, Mayfair Hotel Manager, LLC, Mayfair Hotel Property Investors, LLC, Mayfair House Hotel, LLC, Melbourne Hotel Investors, LLC, Melbourne Hotel Manager, LLC, Printers Row Investors, LLC, Printers Row Manager, LLC, Printers Row, LLC, Readhouse Investors, LP, Robert Falor Investments, LLC, South Beach Hotel Investors, LLC, South Beach Investors, LLC, South Beach Manager, LLC, State Street Hotel Property, LLC, Tides Hotel Investors, LLC, Tides Manager, LLC, Tides Hotel Property, LLC and in any of the Guy Mitchell Entities (collectively the "Robert Falor Entities");

(c) the ownership and/or management interests of Defendant Chris Falor in Royal Palm Investors, LLC, Royal Palm Manager, LLC, any of the Guy Mitchell Entities, and any of the Robert Falor Entities;

(d) the ownership and/or management interests of Geoffrey Hockman in Royal Palm Investors, LLC, Royal Palm Manager, LLC, any of the Guy Mitchell Entities, and any of the Robert Falor Entities; and

(e) the ownership and/or management interests of Defendant David Falor in Royal Palm Investors, LLC, Royal Palm Manager, LLC, any of the Guy Mitchell Entities, and any of the Robert Falor Entities; and it is further

ORDERED, that the Receiver (i) Shall take possession of all personal property described in paragraphs (a)-(e) above (hereinafter the "Receivership Property"); (ii) May employ agents, employees, clerks, and accountants incidental to his services, provided however that the Receiver may employ counsel and file suit only with permission of the Court; (iii) May incur the risks and obligations ordinarily incurred by receivers; (iv) May assume any management role,

including, but not limited to, whether as an owner, member, managing member, partner, president, shareholder, manager or otherwise, currently held by Defendants Guy Mitchell, Robert Falor, Chris Falor, Geoffrey Hockman and/or David Falor, whether directly or indirectly, in or in respect of any of the Receivership Property, and may perform any and all acts and exercise all authority that Defendants Guy Mitchell, Robert Falor, Chris Falor, Geoffrey Hockman and/or David Falor are authorized, empowered, obligated or otherwise permitted to do under the respective operating agreements, articles of incorporation, bylaws, or statutes governing management of the Receivership Property; and (v) May assert any legal rights that the Defendants may have to challenge any purported third party rights in the Receivership Property, notwithstanding any of the other provisions of this Order, and it is further

ORDERED, that any and all persons claiming any interest in any of the Receivership Property be and hereby are and shall be enjoined (i) from commencing any action against the Receiver, ^{or} (ii) from interfering or impeding in any manner or to any extent with the Receiver's possession, dominion and control of the Receivership Property, ^{or} (iii) from interfering or impeding in any manner or to any extent with the discharge of the duties of the Receiver herein, except with the express permission of this Court obtained after filing a motion on notice to the Receiver and all parties to this action, and it is further

ORDERED, that nothing herein shall be deemed to enlarge any rights or privileges of the Receivership Property as against any third party, and it is further

ORDERED, that the Receiver and Plaintiff Hotel 71 Mezz Lender, LLC, may at any time apply to this Court for further instructions and orders related to this Order and for additional powers necessary to enable the Receiver to perform the Receiver's duties properly at any time on noticed motion, and it is further

ORDERED, that the Receiver shall take possession of and be fully authorized to exercise dominion and control of any and all property described in the Order of Attachment as the equivalent of the Sheriff of the County of New York's agent, that the Receiver shall serve papers on the Sheriff indicating as much, and that this shall constitute attornment to the Sheriff under the Order of Attachment, and it is further

ORDERED, that pursuant to Section 202.52 of the Uniform Civil Rules for the Supreme Court and the County Court, (i) the Receiver shall keep separate written accounts for each of the Defendants, (ii) the Receiver shall promptly deposit any funds received in an interest-bearing account, in ~~the following bank or trust company designated by the Court.~~


any New York State commercial Bank,
(iii) the account shall be in the Receiver's name as receiver or assignee and shall show the name of the above-referenced matter, (iv) the depository shall furnish monthly statements to the receiver or assignee and to the attorney for the receiver or the assignee, (v) no funds shall be withdrawn from a receiver's or assignee's account, and no check thereon shall be honored, unless directed by court order or the check is countersigned by the receiver's or assignee's surety, and it is further


ORDERED, that at such intervals as the Receiver deems appropriate, the Receiver shall apply, upon notice to all parties to this action, to the Court for permission to (i) pay all the Receiver's expenses, including any fees owed to the Sheriff of the County of New York, but not including general office expenses, from the proceeds of the aforesaid sale or other disposition of the Receivership Property, ~~(ii) receive compensation pursuant to CPLR 8004~~
~~pay from the proceeds of the sale or other disposition of the~~
~~Receivership Property an amount equal to five percent of the net proceeds as his fee,~~ and (iii) expeditiously transfer to Plaintiff Hotel 71 Mezz Lender, LLC, in partial satisfaction of Plaintiff's

Judgment, any remaining funds or other property of any type or nature obtained from or in respect of any sale or other disposition of the Receivership Property, and it is further

(Handwritten signature)

ORDERED, that the Receiver, before entering upon his duties, shall give an undertaking to faithfully discharge his duties, with sufficient surety or sureties to be approved by the court in the penal sum of \$250,000 (\$) Dollars, and file that bond in the Office of the Clerk of the County of New York, and serve copies thereof upon the Defendants Guy Mitchell, Robert Falor, Chris Falor, Geoffrey Hockman and David Falor, and that upon the filing of this order and the final approval and filing of the bond as required by law, the Receiver shall be invested with all the rights and powers of a receiver as such according to law and practice, and it is further

ORDERED, that the Defendants Guy Mitchell, Robert Falor, Chris Falor, Geoffrey Hockman and David Falor are restrained from doing the following: (i) Disposing of the Receivership Property and any and all funds or property now or hereafter subject to this Order, except to transfer the Receivership Property to the Receiver; (ii) Diverting, concealing, encumbering, or transferring any of the Receivership Property; (iii) Interfering in any manner with the discharge of the Receiver's duties under this Order, (iv) Doing any act that will impair the preservation of Plaintiff Hotel 71 Mezz Lender, LLC's interest in the Receivership Property, and it is further

ORDERED, that the Defendants Guy Mitchell, Robert Falor, Chris Falor, Geoffrey Hockman and David Falor and their agents, accountants, servants, and attorneys are directed to do the following: (i) To execute and deliver to the Receiver all documents necessary for the Receiver to take possession of the Receivership Property; (ii) To expeditiously relinquish possession of and turn over possession to the Receiver of any and all documents, books, and

records relating to and/or evidencing the Receivership Property, including, but not limited to, accounting records, bank statements, financial statements, operating statements, and loan agreements, including any information stored on computer, and to promptly, fully and truthfully answer any reasonable questions asked by the Receiver concerning such documents, books, and records, and it is further

CHS
Order shall
ORDERED, that to the extent there is any conflict between this Order and the transcript of the hearing held in this action on March 26, 2008, ^{and the terms of the 4/2/08 Order,} the terms of this Order shall supersede the transcript ^{and constitute a final and controlling Order on this Motion.}

Dated: April 4, 2008


Hon. Charles Edward Ramos, J.S.C.

FILED
APR 07 2008
COUNTY CLERK'S OFFICE
NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK.
COUNTY OF NEW YORK - CIVIL TERM - PART 53

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HOTEL 71 MEZZ LENDER, LLC

Plaintiff,

-against-

ROBERT D. FALOR, DAVID FALOR, CHRIS M. FALOR,
JENNIFER FALOR, GEOFFREY L. HOCKMAN, GUY T. MITCHELL,
and AMY MITCHELL,

Defendants.

-----X
Index # 601175/07

Proceedings

60 Centre Street
New York, New York
June 16, 2008

B E F O R E:

HONORABLE CHARLES E. RAMOS,
Supreme Court Justice.

A P P E A R A N C E S:

AKIN GUMP STAUSS HAUER & FELD, LLP
590 Madison Avenue
New York, New York 10022-2524
BY: ROBERT HOTZ, ESQ.
and RICHARD NASSEL, ESQ.
Attorneys for Plaintiff

GIBSON, DUNN & CRUTCHER, LLP
200 Park Avenue
New York, New York 10166-0193
BY: ROBERT L. WEIGEL, ESQ.
Attorneys for the Plaintiff - Hotel 71

DEBORAH A. ROTHROCK, RPR
OFFICIAL COURT REPORTER

1 -Proceedings-

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McCABE & MACK, LLP
63 Washington Street
Poughkeepsie, New York 12602-0509
BY: PHILLIP SHATZ, ESQ.
Attorneys for Receiver Rosenblatt

SIDLEY AUSTIN, LLP
787 Seventh Avenue
New York, New York 10019
BY: ISAAC S. GREANEY, ESQ.
and Andrew Ross
Attorneys for Carbon Capital

TODTMAN, NACHAMIE, SPIZZ & JOHNS, P.C.
425 Park Avenue
New York, New York 10022
By: MATHEW E. HOFFMAN, ESQ.
Attorneys for Defendant-Amy Mitchell

BERGER & WEBB, LLP
1633 Broadway
New York, New York 10019
BY: STEVEN BERGER, ESQ.
Attorneys for Defendant-Guy Mitchell

ALSO PRESENT: RECEIVER ALBERT M. ROSENBLATT

1 -Proceedings-

2 (Whereupon, the following is heard
3 before the Court.)

4 THE COURT: All right.

5 MR. HOLTZ: Robert Hotz from Akin Gump
6 for the Plaintiff Mezz Lender. And this is
7 Richard Nassel from my firm as well, he's not
8 going to be speaking.

9 MR. SHATZ: Phillip Shatz from the firm
10 of McCabe & Mack representing the Receiver
11 Rosenblatt.

12 JUDGE ROSENBLATT: I am the Receiver
13 Albert Rosenblatt.

14 MR. WEIGEL: Robert Weigel from Gibson,
15 Dunn & Crutcher for Hotel 71.

16 MR. ROSS: Andrew Ross Sidley Austin
17 representing Carbon Capital.

18 MR. GREANEY: Isaac Greaney form Sidley
19 Austin representing Carbon Capital.

20 MR. HOFFMAN: Mathew Hoffman from
21 Todtman, Nachamie, Pizz & Johns representing Amy
22 Mitchell on motion to dismiss.

23 MR. BERGER: Steven A. Berger from
24 Berger & Webb for Guy Mitchell.

25 THE COURT: I think I have three motions
26 at least.

1 -Proceedings-

2 Which one will we start with?

3 MR. HOFFMAN: Your Honor, our motion
4 with regard to Amy Mitchell is fairly simple.

5 Of course you will have to hear them all
6 one way or the other.

7 THE COURT: This is not-- this is
8 against Falor?

9 MR. HOFFMAN: No.

10 THE COURT: You would happen to know the
11 sequence number?

12 Apparently this is motion Sequence 029.
13 Motion sequence 29.

14 This is Amy Mitchell's motion, right?

15 MR. HOFFMAN: Yes, your Honor.

16 THE COURT: Proceed.

17 MR. HOFFMAN: Your Honor, my name is Mat
18 Hoffman and I represent Amy Mitchell.

19 I'm here to argue on her behalf that she
20 should be dismissed from the case because the
21 Court does not have jurisdiction over her.

22 There's no contention here that there is
23 long-arm jurisdiction.

24 There is only a contention here that Amy
25 Mitchell -- that there's jurisdiction over Amy
26 Mitchell based on a side letter.

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2 I would like, with the Court's
3 permission, to hand up the language of the side
4 letter that I will be discussing. It is not the
5 entire side letter, your Honor. I've chosen to
6 take certain language from it that I will be
7 discussing and thought it might be more
8 convenient for the Court if the Court had it.

9 THE COURT: Hold on. I want to find it
10 in the record.

11 As usual, it is wonderful motions that
12 are electronically filed. I don't have a
13 complete set of paper.

14 MR. HOTZ: Your Honor, I could hand up
15 the entire side letter and the guarantee of
16 payment.

17 THE COURT: I would like to see papers
18 in opposition to motion to dismiss.

19 Is there an Affidavit submitted or memo
20 of law?

21 MR. HOTZ: Just a memo of law.

22 THE COURT: Does it annexed have the
23 exhibits?

24 MR. HOTZ: No, I believe that the papers
25 were --the relevant signed agreement and
26 guarantee of payment were attached and in the

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2 motion.

5 | THE COURT: Yes.

6 MR. Hoffman: May I hand up the excerpt?

7 THE COURT: No.

8 | What is the date?

9 MR. HOFFMAN: Exhibit A is dated
10 March 29, 2005.

11 THE COURT: What paragraph?

12 MR. HOFFMAN: All the way down to the
13 bottom where it says: "It is agreed."

14 THE COURT: Right.

15 (Pausing.)

16 | Okay.

17 What you are saying is that it does
18 incorporate guarantee --

19 MR. HOFFMAN: Well, what I am saying,
20 your Honor, it does incorporate the guarantee,
21 which has consent to jurisdiction.

22 My point is two-folds, your Honor.

First, assuming that the guarantee is incorporated in whole and that the guarantee has consent of jurisdiction. The jurisdiction over Amy is not merely as broad picture as the claims

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2 in the complaint.

3 They are entitled to, if you read
4 language here, in the side letter, to only -- and
5 I am reading from the last piece:

6 "Only to the extent of the value of such
7 assets as transferred to or owned by Amy
8 Mitchell."

9 Therefore, there is jurisdiction,
10 basically, which is only really based on this
11 letter, the incorporation of the guarantee, is
12 only to that extent.

13 THE COURT: I am a little confused.

14 MR. HOFFMAN: Yes.

15 THE COURT: The relief they're seeking
16 is Amy pursuant to this side letter?

17 MR. HOFFMAN: Well, yes and no.

18 They are seeking for broader relief than
19 the side letter, your Honor.

20 They are seeking to hold her responsible
21 for the entire debt.

22 THE COURT: There's language limitation
23 in this side letter?

24 MR. HOFFMAN: Correct.

25 THE COURT: Where you say in that
26 language, that it trumps under some broader

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language in the guarantee?

MR. HOFFMAN: No.

What I am saying, your Honor, is that
-- yes, that is in fact correct.

I'm saying that it trumps the broader language of the guarantee. It is specific. It says it is only incorporated to that extent.

THE COURT: What do you say Plaintiff is seeking in excess of the language of limitation?

MR. HOFFMAN: Because what they are seeking -- if you look at the complaint, they're not just seeking to hold her liable under the side agreement. They're seeking to hold liability under the entire debt.

And under the -- and according to their complaint. And according to this language here they're not entitled to do it. So their broad causes of action are inappropriate.

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2 THE COURT: Let me read.

3 (Pausing.)

4 THE COURT: Who wants to speak in
5 opposition?

6 MR. HOLTZ: I will, Robert Holtz.

7 THE COURT: Yes.

8 MR. HOLTZ: Your Honor, we are seeking
9 to revoke jurisdiction under a side letter which
10 incorporates by a reference the terms of the
11 guarantee of payment.

12 The terms of guarantee of payment are
13 clear, they are incorporated. In fact, they were
14 attached to the actual side letter.

15 And in fact, it is interesting that
16 counsel did not read from the first paragraph of
17 the side letter, which expressly incorporates the
18 guarantee of payment and also by reference makes
19 it a part of this agreement. It attaches a copy
20 to it of it.

21 Under Section 5.3 (B) of the guarantee
22 of payment, Ms. Mitchell has consented to
23 personal jurisdiction by this Court for any legal
24 suit or action or proceeding against her arising
25 out of or relating to this guarantee.

26 THE COURT: Okay.

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2 MR. HOTZ: We have limited thereto.

3 And our causes of action are breach of a
4 guarantee.

5 We also have three causes of action for
6 fraud --one related to actual fraud in connection
7 with the fraudulent transfer of assets between
8 Mr. Mitchell and Mrs. Mitchell.

9 And for constructive fraud also arising
10 out of the same transfer of those assets.

11 THE COURT: The claims-- do you accept
12 the limitation that is contained in the last
13 sentence, which would limit her liability to a
14 certain extent. I think we're talking probably
15 about a dollar amount.

16 MR. HOFFMAN: Only to the extent of
17 these actions.

18 MR. HOTZ: Your Honor, that is what the
19 agreement so provides.

20 The only issue is the extent of the
21 assets transferred by Mr. Mitchell to his wife.

22 THE COURT: I don't understand what your
23 objection is.

24 MR. HOFFMAN: My objection is two-folds.

25 They're only allowing not whatever
26 transfers are, your Honor. If you look at the

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language, it is only to the extent of such assets go back that are on a certain financial statement. If you go back into that paragraph. They have gone well beyond that your Honor, in terms of their complaint. They have pled far more liability than the assets in that financial statement.

9 So, assuming they have jurisdiction --
10 let's assume.

15 MR. HOFFMAN: If they were, they were
16 not entitled to reach those because there's only
17 jurisdiction -- I'm not saying there were, your
18 Honor, I don't know.

19 THE COURT: That is what they are
20 alleging.

21 MR. HOFFMAN: Yes, they are alleging.

22 And what we're saying, your Honor, they
23 are only entitled to jurisdiction to the extent
24 they seek those assets. There's no -- to the
25 extent there's fraud and he transferred something
26 else, they are not entitled to sue her for that

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in this court because the jurisdiction granted only to the value of the assets that is in the fine term so transferred.

THE COURT: We're really talking --
we're really talking about a cap on a dollar
amount. They may be able to sue every asset she
has but limited to the value of those assets, the
scheduled assets that were turned over.

Let's say there were five million dollars of assets but 25 million dollars of assets were turned over to her.

In fact, now the assets all combined are worth over \$3 million. These Plaintiffs would be entitled to go after all assets.

MR. HOFFMAN: Well, first, your Honor, the only case that says-- which says you can incorporate jurisdictional consent in a way such as this, in a Supreme Court Nassau case in terms of New York law.

THE COURT: There's no language here
that says she cannot be sued or she can't be
compelled to pay money out of other assets.

It just says the amount is tapped.

MR. HOFFMAN: The question is, they cannot sue her for more than that amount and they

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don't have jurisdiction over any claims over that limit. And the complaint is not so limited.

In the first instance, to the extent they're seeking, general jurisdiction over her for more than that amount, they are not entitled to it.

Therefore, there's no jurisdiction --

THE COURT: Only a limitation on the liability.

MR. HOFFMAN: NO.

THE COURT: That is what it says.

"Would be liable under each of the guarantees but only to the extent of the value of the assets so transferred."

MR. HOFFMAN: The guarantee is the only thing that is arguably gives them jurisdiction.

So they only have jurisdiction to the maximum -- assuming that that gives them --

THE COURT: You got-- we know we have jurisdiction over the person.

Let's say there were 20 transactions that were entered into between Guy and Amy Mitchell, ten are scheduled and ten are not scheduled. Out of the guarantees she owes \$5 million. The Plaintiff goes and tries to

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2 satisfy the judgement --they've got a judgement
3 for \$5 million. And they satisfy out of the 20
4 scheduled -- they satisfied partially out of the
5 20 scheduled transactions -- the ten scheduled
6 transactions. Now they want to go after the
7 other ten, they can.

8 MR. HOFFMAN: We are saying they don't
9 have broad personal jurisdiction. They only have
10 jurisdiction to a certain amount in a certain way
11 assuming that the jurisdiction --

12 THE COURT: You are partially correct.

13 They do have -- there's a cap. There's
14 a limitation on how much Amy is going to be
15 responsible for. Her liability is capped at the
16 net asset value of those assets scheduled.

17 I agree if those assets were only worth
18 \$200,000 and she otherwise had five million
19 dollars, it is capped. The guarantee caps.

20 MR. HOFFMAN: That is not what they
21 pled, your Honor, and they don't have
22 jurisdiction over that amount.

23 Assuming that we accept that this
24 incorporates the jurisdictional rights.

25 THE COURT: First of all, do we know
26 what the assets are worth, the scheduled assets

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are worth?

MR. WEIGEL: It is a substantial amount and likely enough to sink the boat.

I think that the value.

MR. HOFFMAN: Mr. Mitchell listed all of his financial assets on that schedule that he owned at that point in time.

THE COURT: Let me just go back to the
movant for second.

I don't understand your motion. At this point it is premature.

First of all, we don't know if they are actually going to try to recover money in access.

We can cap --and I can do it if it is meaningful to you now, I will grant the motion capping whatever the ultimate recovery will be.

But that is the only restriction.

She's going to be interrogated on anything they consider to be relevant. They're going to ask her about other transactions, quite possibly. And she may have to ultimately -- ultimately there may be a judgement for X number of dollars. They are going to collect that against all of her assets, no exception, all of her assets. There is only a cap on the dollar

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amount, that's all.

MR. BERGER: If I may speak.

THE COURT: Yes.

MR. BERGER: Steven Berger. I do represent the husband here.

I think what we're missing, your Honor, is that the financial statement that limits the guarantee is regarding transfers of assets predating that date or that may take place after that date with regard to those assets.

THE COURT: I'm not following the significance.

MR. BERGER: It was a scheduled list of assets.

THE COURT: Right.

MR. BERGER: What they're looking to do is to deal with fraudulent conveyances that took place in January of 2006, unrelated to the assets that were listed there.

You may be right that if they get a judgement regarding the assets that are covered by the guarantee, they go against any of her assets. But they cannot conduct discovery, for example, of fraudulent conveyances regarding assets.

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2 THE COURT: I see.

3 MR. BERGER: That is the issue.

4 THE COURT: As if they were doing
5 sub-pro prematurely.

6 MR. BERGER: Yes.

7 MR. WEIGEL: Your Honor, if I may.
8 There really are two separate causes of action.

9 One cause of action under the guarantee
10 says however she gets this property.

11 Mr. Mitchell said at the time of the
12 loan, she has nothing, no interest in any of my
13 properties.

14 So she signs a guarantee saying if she
15 does -- now, that is limited by the amount of the
16 financial statement.

17 THE COURT: Language of limitation.

18 MR. WEIGEL: Yes.

19 Subsequent to that in 2006 --

20 THE COURT: Now, she does something else
21 wrong.

22 MR. WEIGEL: She does something else
23 wrong.

24 Mr. Mitchell purports to convey to her,
25 while he's insolvent, it is a transaction without
26 consideration, to his spouse --he's not the first

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guy to think about giving my assets to my wife to avoid a judgement.

THE COURT: The question now is whether or not the consent to liability bleeds over to the other causes of action.

MR. WEIGEL: In addition to the consent of jurisdiction that she has given to be here to litigate the guarantee, whether that allows us to also litigation the fraudulent conveyance claim.

THE COURT: If you are in for a penny
you are in for a pound.

MR. HOFFMAN: She only adopted the
guarantee to the extent. And the guarantee-- so
that what we are saying here is that they pled
that she adopted the guarantee, gave them the
limited adoption of the guarantee. And,
therefore, your Honor, she's only in
jurisdictionally.

THE COURT: No. But that is just it.
It doesn't say I'm consenting to
jurisdiction on these transactions.

She says I'm accepting a cap on liability.

MR. HOFFMAN: Your Honor --

THE COURT: She's consenting to

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2 jurisdiction.

3 MR. HOFFMAN: I'll assume for sake of
4 argument that the Court's reading is one
5 legitimate reading.

6 In order to accept jurisdiction it has
7 to be clear and convincing that there's an
8 jurisdiction acceptance. And that is not clear
9 and convincing.

10 One could read it that it is limited
11 only to the extent there are transfers of assets.

12 Let's look back at the language.

13 It is only if we look -- go back to the
14 language.

15 She is not a party to and has not
16 liability under any of the guarantee--
17 --skipping now -- with the exception of except to
18 the extent of any of the assets described. Okay,
19 which are owned or become transfer to Amy
20 Mitchell.

21 It is to that extent that she has
22 conceded arguably to the jurisdiction of the
23 court, assuming you accept their incorporation by
24 reference language.

25 But she has not given a blanket consent.

26 THE COURT: Once she becomes guarantor

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she's the guarantor.

MR. HOFFMAN: She is guarantor to limited extent not on everything to the world.

THE COURT: Motion denied. I disagree.

MR. BERGER: Judge, If I could just one final word.

THE COURT: Sure.

MR. BERGER: One asset everybody agrees was not on that financial statement is the Royal Palm. You know, about the Royal Palm. It is the jewel in the crown.

The Royal Palm, not being asset on that statement, indeed I believe it was acquired by Mr. Mitchell after the statement was given and after he signed the guarantee. Assume for purposes of discussions that there was a transfer to Amy of his interest in the Royal Palm in January '06, if that is not sub-pro, I don't know what it is.

You can't try in this Court, I believe, under that jurisdictional limitation, the issue of the fraudulent transfer relating to the Royal Palm. It has got to go to Florida.

THE COURT: Because it is outside of
the--

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2 MR. WEIGEL: Your Honor, I read the
3 guarantee--

4 THE COURT: But wait a minute. Wait a
5 minute.

6 I keep getting back to the fact that
7 this is not a limitation of jurisdiction. It is
8 a jurisdictional of liability in an amount, in an
9 amount, in an amount.

10 MR. BERGER: No.

11 THE COURT: Once you are a guarantor,
12 you're guarantor.

13 Once you consented to jurisdiction,
14 you're consented yourself to jurisdiction.

15 If there's a limitation as to the
16 amount, it is fine.

17 MR. BERGER: It is not just a cap on
18 liability.

19 I am consenting to my jurisdiction.

20 I argued this with you in an earlier
21 point in time, Judge, whether or not the
22 corporation was really subjected to her for
23 jurisdiction, because she actually never signed a
24 piece of paper saying I submit to the
25 jurisdiction in the State of New York.

26 Even assuming the arguendo, as Mr.

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Hoffman does, that she does get into this courthouse, it is only with regard to jurisdictional with her relating to that limitation.

It is not in for a penny in for a pound
jurisdiction, Judge. That's sub-pro on the
Royal Palm. And for that they got to go to
Florida.

MR. WEIGEL: Your Honor, these LLC's were attached to this courtroom.

278 of the debtor credit law allows us--
you may remember this. This was their
certificate that Mr. Mitchell said convey the
interest to himself and his wife.

Your Honor was going to hold hearing.
Mr. Mitchell would not come up to testify about
the certificates.

Mr. Mitchell who has now testified.
What happened, his testimony was stricken.

There is jurisdiction.
This is already in the hands of the
Receiver. The Receiver already has the property.
They argued this up in the Appellate Division
last week.

THE COURT: This is not slam dunk. It

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2 is an interesting argument you're making.

3 The limitation is only as to amount
4 there is no other limitation.

5 Motion is denied.

6 MR. HOFFMAN: Thank you, your Honor.

7 MR. SHATZ: Your Honor, before we get to
8 the main motion, may I approach?

9 MR. HOTZ: Your Honor, in terms of last
10 motion, just in setting a time for Ms. Mitchell
11 to respond, she has to answer now. I believe
12 under 3211 (F) she would have ten days from the
13 notice of entry of this order. So, your Honor,
14 we can provide you with the order by the close of
15 business today so that it could be entered.

16 THE COURT: No problem.

17 MR. HOFFMAN: May I be excused?

18 THE COURT: Have a nice say.

19 MR. SHATZ: Your Honor, I represent
20 Steven Rosenblatt.

21 We went to Chicago, Illinois to attempt
22 to take control of the Hotel Blake there. We
23 served the order on the senior officer present
24 and we were rebuffed. The only way that we know
25 that he had domesticated the order in Illinois
and we had consulted with counsel.

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2 Under the terms of your order, we must
3 have your consent to bring action-- to bring
4 suit. So I'm here. If I may, I want to pass up
5 a letters. And I have two orders, your Honor.

6 One, limiting it to the hotel in
7 Illinois, but we also now have discovered a hotel
8 in Melville, Florida. And we also found five
9 shopping centers in Georgia.

10 So, the second order, which is the
11 bottom one, gives leave to bring suit in whatever
12 jurisdiction as is required to enable the
13 Receiver to perform his duties.

14 THE COURT: Have you distributed copies?

15 MR. SHATZ: I have distributed copies.

16 MR. WEIGEL: Your Honor, Mr. Padian's
17 client is impacted by this and he's not here,
18 Gerald Padian.

19 I think we need to serve that.

20 MR. SHATZ: I was not aware, your Honor,
21 of his being involved. I have a list which did
22 not include him. None of the papers we have
23 served have been served on him.

24 THE COURT: Once you serve him, then you
25 get it to my chambers by mail or messenger or
26 whatever.

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2 MR. WEIGEL: We can deliver it, yes.

3 MR. SHATZ: Sure.

4 THE COURT: Coordinate with counsel.

5 MR. SHATZ: You prefer this to
6 hand-delivery before we send this to you, your
7 Honor.

8 THE COURT: Yes.

9 MR. SHATZ: Very well, your Honor, thank
10 you.

11 THE COURT: All right.

12 What are we going to T-up next?

13 MR. SHATZ: Your Honor, we received
14 --submitted a letter to you on the June 12th by
15 fax. I have the originals here, if it please the
16 Court.

17 May I approach.

18 THE COURT: Please.

19 (Handing.)

20 MR. SHATZ: We are caught in a situation
21 where there appears to be a dispute as to which
22 court should be governing what in connection
23 between the Federal Court and State Court.

24 THE COURT: Judge Sprizzo and I have
25 been missing each other. Unfortunately, Judge
Sprizzo is about to go back into the hospital.

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2 We keep missing one another. I am going to try
3 to hook up with him tomorrow and see if we can
4 discuss this. But we have been in touch with his
5 chambers and just have been missing each other.

6 I am sorry.

7 What else did you want to say?

8 MR. SHATZ: Receiver Rosenblatt seeks
9 direction from you because he is an arm of your
10 court and because there is a jurisdictional
11 dispute.

12 And we received a letter from Mr.
13 Greaney demanding that we withdraw the order to
14 show cause or he would quote "seek appropriate
15 action in another forum."

16 We, representing the Receiver, who is an
17 officer of your court seek guidance from you as
18 to what we should do. Because as an arm of your
19 court, for us to not follow what we understand
20 protection of the res, which is under your
21 possession, is a problem.

22 And, your Honor, there is kind of a
23 distinction in the transcript at the hearing
24 before Judge Sprizzo, he acknowledges that the
25 res was under possession of the state court,
26 which would presumptively give you jurisdiction.

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But he makes a distinction somehow between the
res and the corporation itself.

That is why we are caught in a quandary.

We believe they are one of the same and we need guidance. We don't want to be contemptuous of your court nor be contemptuous of his court.

THE COURT: You are entitled to have my direction, obviously.

MR. SHATZ: Thank you.

THE COURT: Let's hear your thoughts.

MR. GREANEY: Sure.

Isaac Greaney from the Offices of Sidley
Austin for Carbon Capital.

I think the current situation with what is going on in the federal action and what is going on in here, is not in need of any intervention by you right now.

We had a deposition notice, which was one of the things that precipitated Judge Rosenblatt coming to you. That deposition is going to take place at 1:30. It is not going to be --Receiver Rosenblatt is not what we every intended nor expected.

It is going to be one of the employees
of the Royal Palm Hotel who has the knowledge of

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2 the day-to-day goings on there.

3 Mr. Shatz and his colleague went before
4 Judge Sprizzo and Judge Sprizzo took the
5 position, as set forth in the transcript that we
6 sent to you. He has jurisdiction of the LLC in
7 that case.

8 The goal of which is to determine the
9 rights and obligations of the parties with regard
10 to particular contracts.

11 He is not asserting jurisdiction over
12 the ultimate res, whichever one we're talking
13 about, or over Receiver Rosenblatt's action.

14 And Carbon Capital has absolutely no
15 intentions of interfering with what Receiver
16 Rosenblatt has been doing. In fact, I think we
17 have been facilitating in that effort as much as
18 we can.

19 All we are seeking from Judge Sprizzo is
20 a declaratory judgement as to the rights and
21 obligations of the parties under the agreements
22 that existed long before Judge Rosenblatt was
23 appointed by you as Receiver.

24 MR. WEIGEL: Your Honor, this ties into
25 the second action that we filed against Carbon
26 on behalf of Hotel 71.

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2 If I may, I would like to address this
3 at this same time.

4 We were not invited to federal court
5 because we're not diverse. If anybody were to
6 bring my client into Federal Court we would be
7 all back in front of you and in front of you for
8 the Court.

9 So, we have been forced to protect our
10 rights to bring an action against Carbon here.

11 I would like to explain what Carbon is
12 trying to do, your Honor.

13 The hotel, the Royal Palm, was in
14 contract to be sold for approximately
15 \$200 million to the Hyatt, it was some months
16 ago. And I don't know if 200 is the right
17 number, your Honor, or is 190 or 210, or even if
18 the swing is bigger than that.

19 But there's a first mortgage on this of
20 about 112 million dollars, based not upon our in
21 investigate, but what people are representing.
22 And Carbon's loan is approximately, I think, 37
23 million dollars. So there's about 150 million
24 ahead. Maybe there's some more. Maybe the hotel
25 is worth a little less, maybe the hotel is worth
26 a little more. But there's substantial equity

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whether it is 50 million or 40 million. There's substantial equity here.

Now, Carbon is claiming that they figured out a way to avoid -- the limitations on straight foreclosures in the UCC and they have gotten around it somehow.

And now how do they do that?

Well, the day after Mr. Mitchell was attached here by the Sheriff, he signs an agreement. And in that agreement he says six months from now if I don't get the hotel sold, things will happen, you can have title to it.

Now, in that agreement Carbon waives all prior defaults. So the loan is not in default. At that time Mr. Mitchell is a defendant in the lawsuit. Mr. Mitchell knows this is not going to go well. He knows that ultimately he will end up owing my client a substantial amount of money.

Mr. Mitchell argues for six months time in which he-- and he signs the conveyance by the way. Mr. Mitchell personally signs both as the guarantor and the manager of Royal Palm Senior Investors.

Mr. Mitchell, at the time he does this,
has a bad intent. We know this because Mr.

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Mitchell has stolen \$3.8 million from the hotel, according to the books and records that were uncovered by Receiver Rosenblatt.

Mr. Mitchell then purports to have sent that money -- he testified to this-- to a trust in the Cook Islands where supposedly US judgements are not recognized, using a law firm which I -- may I approach, your Honor?

Using a law firm that specializing in asset protection trust planning. They advertise on the internet.

And I attached the latest article that this gentleman wrote, which he posts on the internet, which is entitled "Contempt of the Court. Will Not Go To Jail If I Establish An Offshore Trust."

Mr. Mitchell took the six months he got from Carbon and used it to steal, to send the money to the Cook Islands. He testified to this. It is astounding.

Now, Carbon didn't actually get title at that point in time. They waived defaults. And now they claim that the day-- once our notice for Receiver was appointed, they claim that they sent a letter, that that meant that Mitchell was now

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2 in default under this agreement and they can now
3 take 100 percent of the equity of the hotel.

4 Now, the UCC, you know, strict
5 forecloses are frowned upon.

6 The UCC has a specific provision 9620,
7 which says:

8 "When a lender can take collateral in
9 full or in partial satisfaction of the debt,
10 there are notice requirements and there are --"

11 THE COURT: I'm having difficulty
12 following the logical here.

13 Your position in this particular case
14 has a judgement granted, correct?

15 MR. WEIGEL: Yes, your Honor.

16 THE COURT: And your client's rights
17 were perfected at the time of the order?

18 MR. WEIGEL: Yes. On anything that Mr.
19 Mitchell and the other defendants had in any of
20 these LLC's.

21 THE COURT: How can what Mr. Mitchell
22 does with Carbon, if retroactively, affect your
23 client's perfected interest?

24 I don't follow.

25 The perfection of Mezz's interest was as
26 of what date?

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MR. WEIGEL: Well, Mezz was perfected before we attached. In the sense that they had lent the money that forms of the basis of their claim.

THE COURT: Let's think in terms of this. This was not a mortgage on this particular asset, correct?

MR. WEIGEL: This was a Mezzanine Financing borrowed by Royal Palm Senior Investors, secured by shares of the entity that actually owns the hotel. So, they had a lien on those shares.

THE COURT: Yes.

The collateral we're talking about here
is the shares of stock?

MR. WEIGEL: Shares of LLC, yes, your Honor, membership.

THE COURT: You're saying that the stock
was pledged as collateral to your client?

MR. WEIGEL: No.

THE COURT: What?

MR. WEIGEL: I'm sorry, there's are two
Mezz Lenders.

My client is Mess Lender in Illinois and Chicago.

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THE COURT: Right.

MR. WEIGEL: But I have a judgement
against Mitchell. They were Mezz Lenders in this
hotel --

THE COURT: Carbon --

MR. WEIGEL: Yes, Carbon.

Carbon had a lien on the stock or the
LLC interest of the company that actually owns
the hotel.

THE COURT: And that lien had been perfected long before we came around on this?

MR. WEIGEL: Yes.

THE COURT: Was that on 100 percent share of the stock?

MR. WEIGEL: It was, your Honor. But it
only secured the debt. I think the debt was
originally 24 million and then it became
something like 37 million.

So, if they had not screwed it up, there's no doubt there comes at some point in time they could have held a UCC sale. And it turns out these shares may be worth \$70 million. They secure a loan for 24 million or 30 million, whatever it was.

THE COURT: As a judgement creditor,

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your rights could be defeated by a prior lien or
in this case, 100 percent of the stock stood as
collateral for the outstanding balance owed to
Carbon?

MR. WEIGEL: Yes, your Honor.

THE COURT: What was the value of the stock at the time that Carbon declared default?

THE COURT: There's still a surplus?

MR. WEIGEL: There's still a surplus.

15 They're claiming that they have somehow
16 they have eliminated that surplus.

THE COURT: They can't.

MR. WEIGEL: Exactly, your Honor.

MR. WEIGEL: Exactly.

23 All we're asking, your Honor, is that
24 Receiver Rosenblatt --there was a broker in place
25 to sell the hotel. Carbon had signed off on
26 that, Mitchell had signed off on that. It is a

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2 company Eastville, It is apparently a very
3 reputable outfit, they have a very fancy
4 brochure, and they are out there trying to market
5 the hotel to all sorts of people who buy
6 \$200 million hotels.

7 The problem is that Carbon, when they
8 claim they suddenly own 100 percent of it and
9 they purport now to both own 100 percent of it
10 and have a website up talking about how they are
11 going to hold a UCC sale, have created chaos in
12 the marketplace.

13 The Receiver will sell this property
14 quickly and promptly in a commercially reasonably
15 manner. He will pay off the first, he will pay
16 off Carbon.

17 THE COURT: Either the Receiver or
18 Carbon could sell off the property.

19 MR. WEIGEL: Yes.

20 THE COURT: And in that sale there has
21 to be an accounting that will demonstrate to what
22 extent the sale proceeds are necessary to satisfy
23 Carbon's loans.

24 The sale has to be conducted in an a
25 honest transaction.

26 MR. WEIGEL: Exactly.

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The problem is that Carbon has taken conflicting positions. They are saying we own 100 percent of it already, we don't have to have a sale. Then they claim they are having a sale. They have created a situation where bidders don't know where they go. Should they go to Eastville or should they go to Carbon.

11 MR. WEIGEL: I am accusing Carbon of
12 violating 9620 of the UCC and 9625 gives your
13 Honor the right to enjoin somebody --

14 THE COURT: This has to be commercially
15 reasonably sale.

16 MR. WEIGEL: Yes, exactly.

17 And they are not following UCC. They
18 admit they're not following UCC. And they are
19 somehow saying the UCC does not apply to them.

20 And this is what is truly interesting.
21 They say 9620 only applies --

THE COURT: I can't.

23 we hold a hearing. I have to come to a
24 conclusion that this is what Carbon is doing.
25 This is the accusation.

26 MR. WEIGEL: Well, I'm happy to have

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hearing, your Honor. And I think we can establish these facts clearly.

Carbon claims that they took
100 percent. And the fact that they have a
website of trying to sell is also in the record.

THE COURT: Is there anything in the agreement that Carbon has with Mitchell that grants Carbon the right to own all of Mitchell's stock regardless of its value?

MR. WEIGEL: They claim it does, your Honor. But that violates 9620 of the UCC.

It is a disguised mortgage or a disguised security interest.

You can't have this sort of automatic I take the collateral when there is default.

The UCC sets forth rules with how to do it and they did not follow.

All we are asking--

THE COURT: That is being done in
Florida, correct?

MR. WEIGEL: Eastville is marketing it
and Eastville is nationwide. So I believe
there's somebody in Florida --

THE COURT: Carbon is represented here.

Is Carbon taking position there's no

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2 need to have a sale?

3 MR. GREANEY: No.

4 Your Honor, if you would indulge me I
5 could try to go through the background and try to
6 be quick. But this kind of shadow shot approach
7 to the facts makes a lot of things misleading.

8 February 2005, Carbon Capital enters
9 into Mezzanine loan with Royal Palm Senior. At
10 the same time, the first --there's a first
11 mortgage lender who loans money to Royal Palm
12 property. The Mezzanine loan is secured by the
13 100 percent membership interest in the Royal Palm
14 property. The first loan is secured by the real
15 property. The maturity date for both of those
16 loans is March 2007. March 2007 rolls around and
17 there's a default on both of those. There's a
18 period of negotiation.

19 Carbon Capital has scheduled a UCC
20 disposition of collateral notice, moved it back a
21 couple of times, had one scheduled for the day
22 after they entered into a forbearance agreement,
23 which is the agreement Mr. Weigel refers to.

24 THE COURT: That is between Falor and
25 Mitchell?

26 MR. GREANEY: Between Carbon Capital and

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Royal Palm Senior LLC.

Mitchell signed on that reaffirming prior guarantee.

This agreement is between Royal Palm Senior and Carbon Capital, the same two parties who entered into the Mezzanine loan agreement in 2005.

Now, I want to make it clear and undisputed that at the time they entered into that forbearance agreement, the loan was in default that Royal Palm Senior, LLC, had no defenses, had no ability to stop the disposition of the collateral sale the next day.

Carbon Capital agreed to forbear on excising undisputed rights to exercise the parameters, in exchange for eight months time, during which Royal Palm Senior would have the ability to sell the hotel.

THE COURT: Now, what happened to ownership during that period of time?

MR. GREANEY: The ownership remains
--nothing changes from the original loan
agreement.

There's 100 percent of ownership and interest. There needs to be the collateral pled

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2 under the agreement. The guarantee --

3 THE COURT: There had been no transfer
4 then from Mitchell to Capital of Mitchell's
5 interest?

6 MR. GREANEY: No.

7 THE COURT: Just collateral.

8 MR. GREANEY: It is collateral.

9 What the parties did in the settlement
10 agreement, and this is why what we have here is a
11 bit of a strong arm about 9620. That is not what
12 happened. And the reason that it would be so
13 defective under the UCC, if that is what the
14 parties were trying to deal with. They were not
15 trying to do that. So none of the things you
16 need to do to accept collateral in partial or
17 full satisfaction of the loan exists.

18 THE COURT: When does Carbon contend
19 that the collateral was turned over in full
20 satisfaction of the loan, prior to perfection of
21 the judgement?

22 MR. GREANEY: It never was turned over
23 in full satisfaction. That is my point.

24 THE COURT: Then clearly Mezz has an
25 interest in the disposition of the property.

26 MR. GREANEY: Let me explain what

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2 happened in the forbearance agreement.

3 MR. WEIGEL: Your Honor, they contend
4 that there was --

5 MR. GREANEY: Let me finish.

6 MR. WEIGEL: -- a conveyance to them,
7 but that did not satisfy any of the debts. That
8 is where your Honor --

9 MR. GREANEY: I am about to explain if I
10 can finish.

11 MR. WEIGEL: Please.

12 MR. GREANEY: What the parties did,
13 which is completely proper under the UCC and set
14 forth in our papers is, in exchange of Carbon's
15 forbearance in exercising these remedies at that
16 time in October of 2007, they agreed for a manner
17 in which, contractually, Carbon would take
18 possession of the collateral at a given time in
19 the future.

20 The way they did that was by March 31,
21 2008, the lone had to be repaid. It was a
22 revived maturity date. There was no forgiveness
23 or satisfaction of the debt. But, what we can do
24 as a lender is not to just take the collateral of
25 satisfaction but take possession of it. This is
not a car we can go and grab off the street.

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THE COURT: You didn't.

MR. GREANEY: We did.

THE COURT: When?

MR. GREANEY: Contractually in October of 2007, at such time that they did not pay off the loan in March 31, 2008, the membership interests were automatically conveyed to our possession.

THE COURT: You think it relates back to
that point in time?

MR. GREANEY: Certainly.

THE COURT: And intervening judgement creditor has no rights?

MR. GREANEY: I did not say they have
not rights.

They step into the shoes, as you said
when my colleague was here for when the receiver
order ends, they step into the shoes wherever Mr.
Mitchell was.

They are not even a creditor of Royal Palm Senior. They have never lent him a penny. They lent some other LLC in Chicago money. We lent Royal Palm Senior \$24 million which is now a much higher amount.

THE COURT: I'm only interested in Guy

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Mitchell's interest in this case.

MR. GREANEY: Exactly.

THE COURT: That's what we are interested in.

MR. GREANEY: The only interest that Guy Mitchell has is as somewhere way up the LLC chain, it does go way up. He has some indirect interest in the membership interest of Royal Palm Senior. That is his interest.

THE COURT: I thought we were talking about ownership interest.

MR. GREANEY: We are a secured creditor
in Royal Palm Senior.

THE COURT: Tell me about Mitchell's ownership interest.

MR. WEIGEL: Mr. Mitchell owns, through a series of LLC's, approximately 84 percent of the Royal Palm Senior endeavor. And, yes, he has put LLC's between there, but he owes 84 percent. That is what they are seeking to extinguish without the benefit of the UCC sale. They are saying they took that. They didn't even give anything for it because they did not wipe out any of the debt.

MR. GREANEY: That is incorrect, your

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Honor.

THE COURT: If they did it properly they could do, but certainly do it before your judgement lien was perfected.

MR. GREANEY: Of course, and we did.

THE COURT: How? When?

MR. GREANEY: We entered into the

THE COURT: That is perspective.

Collateral is a thing. It exists. You let someone walk around with title to that collateral, it's vulnerable. It is not protected. That is why you file mortgages to protect your interest.

MR. GREANEY: Hotel 71 does not have any interest in Royal Palm Senior Investigators, LLC. That is the entity that pledged to Carbon Capital 100 percent of the membership interest in Royal Palm Hotel property. It is a pledged agreement perfected, filed security interest and it existed long before Hotel 71 ever came around.

The only issue--

THE COURT: Someone has to give you a diagram.

Are you disagreeing with Mr. Mitchell's

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2 ownership through the various LLC's?

3 MR. GREANEY: I'm not sure what they
4 are. But he certainly had some level up top to
5 controls it, to have built for quite a bit of
6 money from it.

7 MR. WEIGEL: Mr. Mitchell --

8 MR. GREANEY: The notion that somehow
9 Carbon Capital is in cahoots with Mr. Mitchell to
10 rip-off Hotel 71 is really outrageous and unfair.

11 I mean the reason that we know--

12 THE COURT: I don't think anyone has
13 alleged it.

14 MR. GREANEY: Well, the briefs reads,
15 that under the cover of darkness, Mitchell and
16 Carbon, sneaked around and took the money out of
17 Hotel 71.

18 We don't even know in October of 2007
19 who the heck Hotel 71 is.

20 We entered into a forbearance agreement,
21 hoping that the hotel will sell.

22 THE COURT: You entered into an
23 agreement that in the future will result in your
24 client becoming the owner of something that the
25 client is not the owner of.

26 The only dispute, as I understand, is

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whether or not the intervening judgement creditors get some rights to that asset.

That asset is not in your client's possession and there is no mortgage recorded that covers it.

MR. GREANEY: It is in our client's possession, as it was since February of 2005, that is the point here.

We already had a perfected security interest in that collateral. Nothing changed in that forbearance agreement. And the 9620 is completely mispled.

THE COURT: If he is right he is going to prevail.

MR. WEIGEL: Your Honor, here is the thing, it is very simple.

Your Honor, nobody is saying that they don't --they're not entitled to get their loan repaid.

The question is, they claim that they took the equity of redemption and that Mitchell extinguished it in this document they admittedly said was secret.

THE COURT: He says UCC filing, I'm not
sure.

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MR. GREANEY: I keep trying to finish what the forbearance agreement did, the right to redemption.

MR. WEIGEL: The forbearance agreement was not filed, your Honor.

THE COURT: There's no UCC filing?

MR. WEIGEL: There is a UCC filing on their interest. But the forbearance agreement, which they claim gave them the right to take 100 percent was not filed.

THE COURT: I see.

MR. WEIGEL: And they are trying to take collateral that is worth considerably more than their debt, without the benefit of the UCC.

THE COURT: You have got your prior UCC
filing. Clearly you have a presumptive
preference to these assets to satisfy the 30, 40
million dollars that your client is owed?

MR. WEIGEL: Forty.

MR. GREANEY: Forty.

THE COURT: At some point the allegation is that your client and Mitchell agree to a new deal. And the new deal is that you're not going to recover your money and give him whatever equity redemption there is, you get everything.

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MR. WEIGEL: No.

MR. GREANEY: No.

THE COURT: No.

MR. GREANEY: It is very improperly

set --

Could I explain the contract?

THE COURT: Yes, sure.

14 THE COURT: That is not filed?

15 MR. GREANEY: I am just setting the
16 table for the next part, which is --

17 THE COURT: But what I need to know is
18 what is effective as against intervening
19 judgement creditors. You cannot have a secret
20 agreement with Mr. Mitchell.

21 MR. GREANEY: It's not a secret
22 agreement. It does not change the nature of the
23 collateral which we have security interest long
24 before these folks came around.

25 I am trying to explain. All I need is
26 two minutes to explain. That is all I need.

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2 THE COURT: Yes.

3 MR. GREANEY: In addition to forbearing
4 and setting up a mechanism for taking possession
5 for sale under the UCC, which we are trying to do
6 now, the parties also agree in consideration for
7 the forbearance to a partial waiver of the right
8 of redemption of the equity. Which is also
9 perfectly legitimate under the UCC.

10 It is after default of the Mezzanine
11 loan, way after. And a debtor is allowed to
12 waive the right of redemption after authenticated
13 document. And that is what they did in the
14 settlement agreement. That is what the senior
15 LLC did.

16 The reason it is partial is because if
17 we were to sell the property when we first
18 noticed it in May, the LLC would have gotten
19 100 percent of the excess.

20 If we sold it today, they would get
21 50 percent of the excess.

22 It set up a diminishing schedule of
23 excess proceeds, which was partly in
24 consideration of our forbearing on exercising our
25 remedy in October of 2007.

26 Now, we also had an agreement with Mr.

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-- with the LLC, that if they defaulted under
forbearance agreement, meaning defaulted again.
It already defaulted under the Mezzanine loan
agreement. They want 100 percent of the interest
conveyed to us to --for possession of the
property for sale. That is what we were trying
to do. We are trying to sell the property. We
are in a position, Carbon Capital, of some peril
here.

11 We have a first mortgage which is owed,
12 I don't know where the numbers come from. My
13 understanding of it is 540 million, making
14 outstanding debt on this property 180 million.

15 Wachovia is the servicer of that loan.
16 They have nothing stopping them right now, as I
17 understand, from coming in and taking us out
18 completely.

19 We're being held up by the judgement
20 creditor of another hotel in another place from
21 going ahead trying to sell the property and get
22 back our collateral.

Now, the other issue that I think is important to raise, we are seeing the numbers of 200 million. I don't know, you know, we're in open courtroom here. I will tell you exactly the

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--completely inconsistent with what I have been informed that was told to Mr. Weigel and the Receiver about what the current indications of that property are.

I would invite you to ask them or we could come up to the bench. It is not this happy situation where everybody is just sitting around waiting to carve up the money here.

We are in peril here on the Messanine
loan and there's no reason we should be.

MR. WEIGEL: Your Honor, it is very simple.

The peril that they have created is that they are creating chaos. They're trying to have competing sale with what the Receiver is trying to do. And we have heard numbers as high as 180. We don't know --bids have not come in yet, we don't know.

I don't know. I have never seen that number that they have and there's nothing in the record that supports the idea that the first is

The situation is that this is akin to either a strict foreclose or them buying in at a private sale. You can't do that. You can't give

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up the equity of redemption.

A lender can't have a private sale and take it for himself. He can't make a deal with borrower and say I will take the collateral. The UCC does not allow that.

They could have, if they had not done it so crazily, conducted a perfectly fine UCC sale.

There is a sale process going on. It is reasonable. And they are trying --at one hand they say they own 100 percent and on the other hand they are trying to sell it.

They have created chaos that buyers don't know where to go.

MR. GREANEY: May I explain the difference of the 100 percent and what would have happened under the agreement had March 31st come and pass? I think it is very important.

THE COURT: Yes, go ahead.

MR. GREANEY: All of these issues have to do with possession of the collateral.

This is not -- this is not a car that we
can go get.

This is a hotel that's being operated, that we need to do have the ability to go in there and take control and sell the property.

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All right.

The notion that somehow we're taking all this to ourselves is wrong.

THE COURT: What is Wachovia's position?

They are willing to let you step in?

7 MR. GREANEY: We had --as this was
8 approaching, there have been some communications
9 with Wachovia to the affect that we have issues
10 with Wachovia because the highest piece of the
11 first mortgage is secured. But the answer is
12 yes.

Wachovia was comfortable with us coming in. We had a management company set up.

Now, when the Receiver was appointed, we
didn't run to you and try to throw the Receiver
out or anything. We worked with the Receiver.
We sent insurance information, bank account
information, everything we had that we had got
with Mitchell in our Federal action we sent it.
And we said let's sell the property and let's get
it done.

23 We have been in active negotiations, all
24 of us. But we can't sit here and wait into
25 perpetuity while a judgement creditor on a
26 different hotel waits to maximize the value of

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the hotel while market conditions improves.

The papers say 200 million now. These were filed a week ago. And now it is 180. What is it really?

THE COURT: You will not know until the market tells you.

MR. SHATZ: Representing the Receiver, while the motion here between Hotel 71 and Carbon is not our motion, Receiver is taking possession of the hotel has discovered a sum, a substantial sum, \$3.8 million as adequately met with the broker.

We have agreed to have weekly conference calls.

We have been informed over 27 firms taking tours of the hotel.

It would appear to me that the more logical way for the Court to handle this is to allow the Receiver to seek to sell the hotel, where there's no question there is one seller who is without question has the integrity and the support of the court. And as the Receiver advised your Honor, he understands that after the first mortgagee, Carbon comes in subject to rights of minor creditors of the corporation.

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But if the chaos goes on and makes it very difficult for the receiver to perform its functions. And as Mr. Greaney said, we have been working together, we kept them fully informed of exactly what happened, what our marketing efforts are, the efforts we made to make sure the hotel is run well.

9 It would appear that allowing the
10 Receiver to do his job cannot work Carbon Capital
11 but will allow this court to monitor and see that
12 the manner is done in an orderly manner.

I would hope that on the Receiver's part
that you would enjoin Carbon Capital going
forward with a UCC sale which, in our view, would
destroy the value of the property. Because the
UCC sale will give them defacto in a private
setting to take the entire collateral, which
would really damage the res which is under your
control, your Honor.

21 MR. GREANEY: Your Honor, you understand
22 what is being said. For a judgement creditor
23 again on a different hotel wants to hold on and
24 go through bidding process. They will not agree
25 to sell it at any price. They will not agree
26 when he comes back the end of July and says

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here's the best we can get that they will take it. If we want to sell right away so that we can get money out before the market continues to go down --

THE COURT: Let's try to be practical
for a while.

We have legal issues that have to be decided, obviously, between Capital, Mitchell, and 71 Mezz Hotel. You are right, there's an asset, it is a hotel. Its got to be sold. We want to sell it for the greatest amount. If it all goes to Carbon, fine, to Carbon's benefit. If it gets spread around, it gets spread around.

It does not serve anyone's purpose if we somehow damage the value of the asset in the fire sale. This is going to look like a fire sale anyway. It could look like a little less than fire sale.

MR. GREANEY: There's no way to avoid this.

Mr. Weigel argues in the papers which
is, by the way, in support of irreputable harm.

Carbon Capital is not out there telling the world that there's a problem with the property.

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Mr. Mitchell is the one who caused this upon everybody. And that is what we are doing with and there's no way to stop that. The world knows about it. There's an appeal in the Appellate Division, there's a case next-door, there is a case here-- there is three cases here.

How were we going to stop it? What
is being asked of us is to sit back again. It
has been 15 months now since the loan was due.
To sit back again and say we'll not exercise our
remedies. we'll wait.

Meanwhile, we have got our first lender
Philip Hathaway and would wipe us out.

MR. WEIGEL: I think the first lender
and we have been communicating too.

I think everybody has got to be comfortable now that instead of Mr. Mitchell being in control of the cash, Receiver Rosenblatt is in control of the cash. And every dollar will be accounted for. He will sell it, we think it will yield money to my client. If it does, so be it. I don't control what Receiver Rosenblatt, your Honor does. Receiver Rosenblatt will hear it and try to get the best price.

THE COURT: What harm is there to Carbon

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2 if the Receiver sells the property, all the money
3 goes to escrows. If we have to fight it out we
4 have to fight it out.

I don't what to have fighting going on
while something is being done to the maximize
value of the property.

8 MR. GREANEY: Here is the question for
9 Mr. Weigel. He says this over and over again:

10 We want to sell the property.

11 We think, we're hopeful, we're going to
12 get a little out of it.

13 Ask him when.

14 Is it going to happen when the bids come
15 in at the end of the month or is it going to
16 happen in 2009?

17 THE COURT: Why don't we ask Judge
18 Rosenblatt.

19 MR. GREANEY: Even better.

20 MR. SHATZ: I would like to speak to
21 that.

22 The inference that Mr. Greaney says if
23 the Receiver Rosenblatt will not use his honest
24 and best judgement --

25 MR. GREANEY: No.

MR. SHATZ: --to get a prompt sale at

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2 best price. That is exactly what he said.

3 MR. GREANEY: No.

4 MR. SHATZ: He said how do I know it
5 will be sold this month or next month?

6 What it is is a question of have you
7 chosen a Receiver with the ability and the
8 integrity to do right thing to maximum money
9 coming out of this property.

10 I argue that is self-evident.

11 For that reason, I would hope that the
12 Court would enjoin Carbon from going forward.

13 THE COURT: I am trying to maximize
14 this. Trust me, if I can get \$300 million for
15 the hotel, I would be thrilled.

16 MR. GREANEY: So would everybody.

17 THE COURT: Exactly.

18 I would like to maximize it. I would
19 think that in the process of selling it, if we
20 can calm the collateral issue and get it sold
21 effectively, with everybody on board, as far as
22 to how it's to be sold and what is to be done in
23 terms of the proceeds, and then fight about it
24 later, then it is just money.

25 MR. GREANEY: But everybody wants-- Mr.
26 Mitchell, through the LLC, has been trying to

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2 sell the property for over 18 months --

3 THE COURT: Please, Mr. Mitchell's not
4 the one in charge here.

5 MR. GREANEY: Yes, I know. Please this
6 is important.

7 He has been using recognized brokers,
8 the best around, supposedly, and I don't
9 disagree.

10 He had --he was going to sell it. He
11 had an appraisal done at some point in time of
12 '06 or '07 for 250 million dollars.

13 Then he had the Hyatt deal at the end of
14 '07 for 200 million in Mr. Weigel's papers, that
15 fell through.

16 Now, all of a sudden we're talking about
17 well, maybe we can get 180.

18 The point is, we're the ones on the hook
19 while everybody waits around saying let's find a
20 good time to sell it. If not for Mr. Mitchell--

21 THE COURT: When we agree today what to
22 do and how to sell the thing and get it done.

23 MR. GREANEY: Take the best bid that
24 Eastville comes up with at the end of the month.

25 MR. WEIGEL: Your Honor, we have no
26 objection to doing it quickly. We want it done

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2 quickly --

3 THE COURT: We have to be able to tell
4 Judge Rosenblatt what he's supposed to do. I
5 think we're all confident that if we give him his
6 marching orders he will do it.

7 MR. GREANEY: Absolutely.

14 THE COURT: Are these properties --is
15 this sold by prospectus?

16 MR. WEIGEL: There's a fancy brochure
17 and so forth.

THE COURT: It is not an auction?

19 MR. WEIGEL: It is not auction.

20 They have gone -- they have talked to
21 people, they are going to collect --

THE COURT: Pension funds?

23 MR. GREANEY: It's not an auction.

He's talking about the hotel. He's not
talking about our collateral. He's talking about
real property.

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MR. WEIGEL: When Receiver Rosenblatt is doing which is that Eastville is out marketing the property to pension funds, investment funds.

MR. GREANEY: They're working on selling the real property, your Honor.

7 MR. SHATZ: Let there be an
8 understanding. Through the brokers we're
9 informed something like 125 firms expressed
10 interest. Some 27 firms, as we are told, have
11 taken tours of the property. A date was set to
12 submit bids, originally -- forgive me, your
13 Honor, I believe the 12th of June and because
14 people wanted more time then it was extended, to
15 my memory, the 25th of June when bids will come
16 in. After those bids are in Eastville says they
17 will screen to pick the most probable financially
18 capable buyer. And they are typically given
19 30-day window to due diligence that would be more
20 detailed than going through and looking at
21 finances.

22 The Receiver has moved forward with the
23 utmost diligence.

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frankly, distracted by the litigation. All he wants to do is do his job.

THE COURT: Yes, I understand.

MR. SHATZ: The only way I understand
that to be done would be for your Honor to
inhibit Carbon from going forward in their fight
with Hotel 71 so that the Receiver can --

THE COURT: I don't want to prejudice Carbon's rights vis-a-vis Hotel 71 or the other way around. But I don't want that fight to interfere with the most effective selling of the asset.

Now you've raised another issue, your collateral is the stuff --

MR. GREANEY: Membership interest.

THE COURT: Membership interest, yes.
But the assets that we're seeking to sell is the
hotel itself.

MR. GREANEY: Yes.

MR. WEIGEL: Look your Honor, this is
very --

THE COURT: Wait a minute.

You want the hotel sold as well,
correct?

MR. GREANEY: Of course.

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2 THE COURT: How does that prejudice or
3 does it prejudice your interest vis-a-vis your
4 percentage interest in the LLC?

5 MR. GREANEY: Them selling the hotel, it
6 doesn't.

7 THE COURT: Why don't we move forward
8 with selling the hotel and let's do whatever we
9 have to do to adjudicate the bids, this has to be
10 adjudicated here as opposed to Federal Court.

11 MR. WEIGEL: Yes, your Honor.

12 THE COURT: I think it is Carbon's
13 rights, if any --

14 MR. WEIGEL: I may be wrong, I think I
15 heard my colleague say here, they're not trying
16 to get 100 percent.

24 MR. GREANEY: The 100 percent is not
25 --Mr. Weigel is using the terms loosely.

I want the hundred percent. I want it.

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so that I can sell it under the UCC. That is what the forbearance agreement was all about.

If there was some type of default we got it all, we can sell it.

If it was just a passage of time, we
only got almost all of it and the LLC and Mr.
Mitchell had a right to veto or approve of sale.

This is exactly what we bargained against.

THE COURT: You didn't want hundred percent to sell, you want 100, period.

MR. GREANEY: No, we want 100 percent in our possession to sell it, to get our money out as quickly as possible. That is what I have been saying for the last hour. That is what we want.

THE COURT: Let's assume there's a surplus after your obligation to satisfy the two million dollar surplus, what happens?

MR. GREANEY: Well, we can fight about that under the settlement agreement.

That money could be put somewhere and we can come back before you, my guess is that it probably will be worked out, but that goes to all of Mr. Weigel questions.

THE COURT: What we have to decide today

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2 is how will we sell the property.

3 The question is let Judge Rosenblatt
4 continue to sell.

5 MR. GREANEY: I am perfectly comfortable
6 with Judge Rosenblatt selling property, provided
7 that we are going forward on an tight schedule to
8 get it sold.

9 THE COURT: I like it.

10 MR. GREANEY: It is not fair for us to
11 have any type of discretion on Eastville or Hotel
12 71 or Receiver to pick and choose what market
13 condition they want to sell it.

THE COURT: Yes, I agree. I agree.

15 MR. WEIGEL: The only thing I object --

16 THE COURT: Could you give me your
17 client's word, that you agree for having Judge
18 Rosenblatt move forward as quickly as possible.

1 -Proceedings-

against. Once the bids come in Eastville, the
recognized broker would say Judge Rosenblatt here
is the best one, the most financially secured,
best price, whatever, they do diligence 30 days,
sign papers.

13 THE COURT: And he's in a second
14 position.

15 JUDGE ROSENBLATT: I say now, it is hard
16 for me to imagine how he can drop to third. I
17 can't see any scenario. Mr. Weigel's client is
18 third. My program was, and I understood this
19 throughout, was that I sell it at the maximum
20 price, Wachovia in comes in first 100, 125, he
21 comes in second, they loan 24, they are going to
22 get some more, then the surplus goes to Mr.
23 Weigel.

24 If it sells for 200 everybody is going
25 to be more or less happy.

If it sells 150, then Carbon might be

1 - Proceedings -

2 happy, but Mr. Weigel will not be happy.

3 My concern is this. I was a little
4 confused, Isaacs, when you said you are not
5 trying to get 100 percent. The Judge ask the
6 same question.

I was under the impression, that if you
were to sell it, you would keep all of it because
you own it, which would extinguish completely the
third creditor here.

11 I understood you today to say that is
12 not quite so. If it is not your position that by
13 selling it you would distinguish, I would want to
14 know that.

15 That is another question.

16 THE COURT: It is not irrelevant but
17 that is the second issue we have to deal with.

18 MR. GREANEY: That is just money, your
19 Honor.

20 JUDGE ROSENBLATT: I would be willing to
21 do this.

22 We have moved very very quickly. As
23 soon as we got this, the first thing we did was
24 go down to Florida-- Judge, I wish you had given
25 me the Receivership in February to go down to
26 Aspen.

- Proceedings -

This was the Receivership to go to Florida in June. It was no holiday. I say that with some levity.

We went down there and what did we find?

Not bad looking hotel, it is going to sell for some amount.

We find what appears to be a defauultion of 3.8 million or at least 1.2 million and we share that. We are in open communication because they are very valid, bona fide, second creditors here. And I have nothing to hide from them, we want complete transparency.

I am happy willing and able to continue under the Court's discretion to move as speedily as I can, with help from Carbon, that we expedite this. If I am not moving speedily enough, to come back to court and let them explain why they feel we're not moving speedily.

I don't know I could do it any faster.
If anybody has any idea of how I could do it
faster, I would be happy to cooperate with Isaac.
He is a legitimate bonafied creditor here and I
want to see he gets paid. I have an obligation
to see that he gets paid.

THE COURT: Yes.

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JUDGE ROSENBLATT: Where I baulk is that if he gets paid to the point where he sweeps the table, based on contract, and then the Mezz Lender 17 get's nothing, based on the interpretation of the contract, at that point I may say well, they maybe in violation of the UCC --

9 THE COURT: I can deal with that but
10 that is money.

11 JUDGE ROSENBLATT: That is another
12 matter.

13 So I am happy to work with Mr. Greaney.
14 We have open lines of communication. If he has
15 any suggestion as to how we do it more quickly,
16 fine. But I am under the Court's supervision.

17 I am happy to cooperate and it is in
18 everyone's interest that I sell it as soon as
19 possible.

20 THE COURT: I think everyone agrees, at
21 least I do.

22 MR. GREANEY: I just need to --we need
23 to see it come into reality and some protection --

24 THE COURT: Is there something you need
25 from Judge Rosenblatt by way of updates or
26 correspondence?

1 - Proceedings -

2 MR. GREANEY: There's nothing --I don't
3 think there's anything needed by virtue of order,
4 we have been in communication.

5 The issue I have and I will come back to
6 is when?

7 || When?

When is this going to be sold? And are we going to start delaying things because of the market things or the bids don't come in the way we like them. I am the one on the hook while everyone looks for the best prices.

13 JUDGE ROSENBLATT: You've come in first
14 right after Wachovia. So you are okay.

I can really appreciate your concern it
not go on indefinitely.

17 THE COURT: Is there consciences that
18 the market in Florida is still deteriorating or
19 we don't know?

20 MR. GREANEY: Nobody yet has told you
21 what they heard from Eastville. But what I heard
22 is that, yes, the answer is yes. It is still an
23 issue.

24 JUDGE ROSENBLATT: I have no reason to
25 not share with you what we learned from
26 Eastville. That is --I want complete on complete

1 - Proceedings -

2 transparency.

3 THE COURT: I think to give Carbon some
4 comfort, I think that is the first thing.

5 JUDGE ROSENBLATT: Yes, Judge, how do we
6 do that? I would like to do that too.

7 MR. SHATZ: I want to throw one thing
8 in. In talking about Eastville, they said thank
9 goodness the Receiver is here.

10 The problem with Mitchell was he always
11 had an unrealistic number the thought 220 million
12 was a good number. And it was impossible for
13 them to engage in valid exercise of selling the
14 property.

15 They would be pleased to have somebody
16 with sense, who the Court set down, to take it
17 this over and to get it done.

18 THE COURT: And the sharks would be
19 pleased too. They know it would be sold.
20 Unfortunately that does intend to depress the
21 price.

22 MR. GREANEY: Nobody is saying --I hope
23 I made this clear at least.

24 There's no complaint about Judge
25 Rosenblatt.

The alternative before he came along is

- Proceedings -

somebody stealing at a clip of four million dollars a quarter.

What we have now is some control of the property.

Again, let's go through whatever the process is. I would like to find out what it is to make sure it does not get moved.

THE COURT: I think we have to have you ongoing communication with Judge Rosenblatt's office and with the Court. If you feel something is not moving along quickly enough or if Judge Rosenblatt needs special instruction from me, there's some problem coming.

Look, I think it is working in the right direction. It is just a question of the progress.

JUDGE ROSENBLATT: I you would like I
could supply the Court and Mr. Greaney with
periodic reports weekly even.

I want to do this as quickly as anybody.
And I recognize his rights, which are not only
considerable, but also paramount. So no one wants
to cut him out on the contrary.

And if the Court wants to make some program by which I alert the Court and Carbon to

1 -Proceedings-

2 the progress, then the Court will be able acquire
3 as to whether or not there is any unreasonable
4 delay. You can make that determination. I am
5 happy to work.

6 MR. GREANEY: I am sure we can work
7 together on the details.

8 What would be helpful to us, with
9 respect to our own security, and dealing with
10 certain other parties, Wachovia. It would be
11 helpful to have some time when we know we will be
12 back before your Honor to say why has this not
13 been sold. And if that is July 10th or --

14 THE COURT: Why don't we have 4:00
15 conference calls periodically once a week.

16 MR. GREANEY: Yes, once before the
17 fourth of July would be great to see where we
18 are.

22 THE COURT: We'll do it conference
23 calls.

24 MR. WEIGEL: That would be great.

25 THE COURT: If we get to disclosing
26 prices, it does not get published.

1 -Proceedings-

2 So, let's set up conference 4:00 for a
3 week from today.

4 MR. SHATZ: Your Honor, could it be a
5 week from Thursday. I have the good fortune --

6 THE COURT: I can accommodate everyone.

7 MR. SHATZ: I am going to Denver,
8 Colorado a week from Thursday. It would be
9 greatly appreciated.

10 THE COURT: All right.

11 MR. WEIGEL: May I suggest we talk to
12 Carbon in the interim.

13 THE COURT: Of course.

14 MR. WEIGEL: It may be that we don't
15 need it and we are up to speed. We can just
16 alert your office.

17 THE COURT: Sure.

18 Two issues, the paramount issue for me
19 right now is that, I think I have a feeling of
20 what is going on to get the thing sold.

21 The secondary issue is to dissolve the
22 dispute.

23 MR. GREANEY: If there is anything to
24 fight about.

25 THE COURT: All right.

26 So, are we clear? We're going to

1 - Proceedings -

2 proceed with Judge Rosenblatt full speed ahead.

3 We'll speak on Thursday.

4 Thursday we'll speak.

5 MR. SHATZ: That would be the 26th, your
6 Honor at 4:00 p.m.

7 THE COURT: Call chambers to set up the
8 conference call. If they don't want to
9 participate, fine.

10 MR. WEIGEL: I want to make sure that
11 there's not going to be a UCC sale notice now
12 that Judge Rosenblatt is doing this.

13 MR. GREANEY: We could not even if we
14 wanted to.

15 Judge Sprizzo has enjoined us from doing
16 just that. We would not do that without coming
17 to your Honor first anyway.

THE COURT: Let's get this sold.

19 MR. WEIGEL: Thank you, your Honor.

THE COURT: Good seeing everyone.

21 MR. GREANEY: Thank You.

22 MR. WEIGEL: Thank you.

23 * * * *

It is hereby certified that the
foregoing is a true and accurate transcript of
the proceedings.

DEBORAH A. ROTHROCK, RPR
Official Court Reporter

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South reach

by Matt Miller Posted 02:09 EST, 3, Jun 2008

The Royal Palm Resort, we are reliably informed by unbiased marketers, is perched majestically on Miami's South Beach, basking in sunshine and kissed by ocean breezes. Here's what the promotions don't mention: The Royal Palm has a history of unpaid bills, overdue loans, lawsuits. One partner has been forced out. The property is on the block, although it isn't clear who owns it.

The Royal Palm is part of one of the current real estate crash's many pileups: hotel to condo-hotel conversion. This concept is a variation on the straight hotel-to-condo play. While rooms are sold to retail investors, the property still operates as a hotel. Room owners can stay as long as they want. When not around, their rooms can be rented out.

Florida led the U.S. in these instruments, which means the Sunshine State is sitting on a lot of disasters.

Why fashion these conversions? A traditional hotel can be carved up and sold to individual owners. The developer gets money up front and the project becomes a real estate play as opposed to a long-term investment. The problem is equally straightforward, says Gregory Rumpel, executive vice president of Jones Lang LaSalle Hotels: greed.

A hotel room may be valued at, say, \$100,000. You could argue that an investor might pay \$200,000 for the room, a diminished return offset by the ability to use it as a destination. "You don't buy a condo-hotel for only an investment," Rumpel says, adding that some condo-hotels, well managed and marketed, have prospered even in Miami's market dive.

But in the crazy years of the boom, some developers tried to inflate prices far beyond reasonable values. They marketed to "uneducated and unsuspecting buyers who anticipated a return," Rumpel says. After the crash, investors discovered they were sitting on assets that are not only worth a lot less, but return little relative to the outstanding mortgages.

A Chicago developer, Robert Falor, personifies this mess. He has left busted hotel to condo-hotel deals that include the Royal Palm and four other Florida properties, plus three in Chicago. Multiple bankruptcies, lawsuits and forced sales mark his trail. Attempts to reach Falor weren't successful. His Robert Falor Investments LLC isn't listed in Chicago.

Typical of Falor's approach was a much-ballyhooed — and stillborn — plan to convert hotels into condo-hotels and brand them "Nicky O," after Paris Hilton's lesser-known sister, Nicky. A lawsuit marked the end of that partnership, although why Ms. Hilton would be an inducement to investors is beyond us. It was beyond potential acquirers too. The three properties initially tagged for Nicky's imprint failed to sell any condos. Two — Miami's Breakwater and Edison hotels — went bankrupt (a sale is pending). The third is Chicago's boutique Hotel Blake. Despite many lawsuits, Falor has held onto the property, which remains for sale.

He wasn't as fortunate with the bigger Hotel 71. This 437-room Chicago property filed for Chapter 11 twice last year. Falor defaulted on more than \$100 million in loans and took the hotel into bankruptcy court before creditors could auction off the property. Mezzanine lender **Oaktree Capital Management LLC** assumed the equity. The bankruptcy was dismissed, but Oaktree took the hotel back into Chapter 11 to cut losses. Another distressed real estate fund bought the \$100 million senior debt. No one else wanted to acquire the property, so the fund and its partner will own the hotel.

In Miami, Falor found backing from financier Guy Mitchell to buy the 414-room Royal Palm in 2005 for \$128 million. Last year, R. Donahue Peebles, the previous owner who retained a minority stake, sued Mitchell for

breach of contract. In turn, Mitchell ousted Falor. In the time he was involved, Falor couldn't sell a single room as a condo conversion — a stunning failure in a Miami condo market that was so hot in 2005 and 2006 that a closet might get multiple bids.

That incompetence may be a blessing for current owners, now peddling the hotel for an unrealistic \$220 million. Condo owners seem to only diminish the value of a hotel property these days. However, exactly who owns the Royal Palm is in dispute. An affiliate of **BlackRock Inc.**, which holds a loan for the property it says is in default, wants control. Mitchell has resisted. Lawsuits have flown. It's no day at the beach.

Matt Miller writes about distressed investing for The Deal.

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March 25, 2008

VIA HAND DELIVERY, FEDERAL EXPRESS & U.S. MAIL

Royal Palm Senior Investors Inc.
c/o Guy T. Mitchell
14 Tahiti Beach Island Road
Miami, Florida 33143

Re: Royal Palm Settlement Agreement

Dear Mr. Mitchell:

This letter shall serve as formal notice to you that Royal Palm has failed to satisfy certain obligations required by the Settlement Agreement dated October 24, 2007 among Carbon Capital II, Inc. ("Carbon II"), Royal Palm Senior Investors, LLC ("Royal Palm"), Robert D. Falor, Guy Mitchell and Geoffrey L. Hockman ("Settlement Agreement").

Royal Palm has defaulted on its obligation under Section 6.3.2 of the Settlement Agreement to enter into a replacement Cash Management Agreement with Wachovia Bank, National Association on terms acceptable to Carbon II. Royal Palm has also defaulted on its obligation under Section 8 of the Settlement Agreement to enter into a Replacement Management Agreement for a Qualified Manager approved by Carbon II. In addition to these defaults, Royal Palm is in default under Sections 6.3.3 and 7.1 of the Settlement Agreement.

Royal Palm's failure to comply with the terms and conditions of the Settlement Agreement is a Termination Event pursuant to Section 3.3.1. You are hereby advised that as a result of the occurrence of a Termination Event, Royal Palm is no longer entitled to the Applicable Rate or Excess Proceeds Sharing, as fully described in the Settlement Agreement. You are further advised that Carbon II has the right to foreclose its Collateral pursuant to Section 4.3 of the Settlement Agreement and Carbon II is no longer obligated to release the Formula Judgment as to Guy Mitchell, individually. Carbon II will immediately take steps to enforce its rights as a Judgment Creditor against Mr. Mitchell.

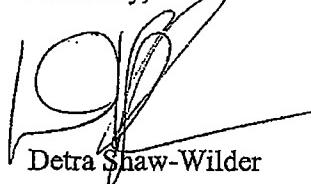
Nothing contained herein is intended, and shall not be construed, as a waiver of, or an election of, any remedy with respect to Royal Palm's obligations under the

Guy T. Mitchell
March 25, 2008
Page 2

Settlement Agreement and/or Loan Documents including, but not limited to, its right to initiate foreclosure proceedings against Royal Palm.

If you have any questions regarding the above, please feel free to contact me.

Sincerely,



A handwritten signature consisting of stylized initials 'D' and 'S' followed by the name 'Detra Shaw-Wilder' written below them.

DPS/es

cc: Frank Pomar
Brian Rich, Esq. (via electronic mail)

3517/101/286392.1

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A T T O R N E Y S A T L A W

Detra P. Shaw-Wilder, Esq.
dps@kttlaw.com | 305.377.0668

April 1, 2008

VIA ELECTRONIC MAIL AND FEDERAL EXPRESS

Royal Palm Senior Investors, LLC
c/o Guy T. Mitchell
14 Tahiti Beach Island Road
Miami, Florida 33143

Re: Royal Palm Senior Investors, LLC ("Royal Palm")

Dear Mr. Mitchell:

Reference is hereby made to (i) the Settlement Agreement, dated October 24, 2007 ("Settlement Agreement"), by and among Carbon Capital II ("Carbon II"), Royal Palm, Robert D. Falor, Guy T. Mitchell and Geoffrey L. Hockman; and (ii) the letter, dated March 28, 2008 (the "Default Letter"), delivered by the undersigned to Royal Palm. Capitalized terms used herein without definition shall have the meanings given thereto in the Settlement Agreement.

In the Default Letter, I notified you that Termination Events had occurred under the terms and conditions of the Settlement Agreement. I am now writing to inform you that, in addition to the Termination Events, the time for a Capital Transaction to occur under the Settlement Agreement expired by its terms on March 31, 2008, the Revised Maturity Date.

Pursuant to Section 3.1 of the Settlement Agreement, because a Capital Transaction did not occur on or before the Revised Maturity Date, 99.9% of Royal Palm's membership interest was automatically conveyed to Carbon II and Carbon II is now the managing member of Royal Palm Hotel Property, LLC. While the transfer of membership interest and management does not require any further documentation, as a condition precedent to the Settlement Agreement, Royal Palm was required to deliver an "executed and *binding*" Power of Attorney to Donald Puglisi to execute an assignment of the membership interest in Carbon II's favor. Notwithstanding your obligation under the Settlement Agreement, Mr. Rich has asserted to Mr. Puglisi that the Power of Attorney that you delivered to Carbon II is not "binding." We find Mr. Rich's argument to be without merit. Nonetheless, pursuant to Section 3.1 of the Settlement Agreement, your cooperation is requested to document and confirm the transfer of the membership interest and management of Royal Palm Hotel Property, LLC. Carbon II hereby requests that Royal Palm execute the enclosed Assignment and Transfer of Membership Interest and cooperate in the execution of any other documents that Carbon II may request in the future to confirm or evidence

Page 2

the transfer of membership interest and management. Please immediately confirm by the close of business on April 2, 2008 that you will comply with these requests and with your obligations under the Settlement Agreement.

Carbon II has negotiated with Davidson Hotel Company, LLC ("Davidson") to manage the Royal Palm Hotel. In addition to execution of the documents referenced above, Carbon II also requests that you instruct Naveen Ahuja, the current property manager, to assist in implementing a smooth and orderly transfer of hotel management. A representative from Davidson will contact Mr. Ahuja shortly to discuss and implement a plan to transfer management.

Nothing contained herein is intended to, and shall not be deemed, as a waiver of any of Carbon II's rights and/or remedies under the Settlement Agreement or applicable law including, but not limited to, its right to foreclose or otherwise seek a transfer of the remaining 0.1% membership interest in Royal Palm Hotel Property, LLC that Carbon II is entitled to receive under the Settlement Agreement.

If you have any questions regarding the above, please feel free to contact me.

Sincerely,



Detra Shaw-Wilder

DPS/es

cc: Frank Pomar
Brian Rich, Esq.
John Buehner, Esq.

3517/101/286674.1

ASSIGNMENT AND TRANSFER OF MEMBERSHIP INTEREST

THIS ASSIGNMENT AND TRANSFER OF MEMBERSHIP INTEREST (this "Assignment") is made and executed this 26th day of March 2008, by ROYAL PALM SENIOR INVESTORS, LLC, a Delaware limited liability company ("Assignor") in favor of CARBON CAPITAL II, INC., a Maryland Corporation ("Assignee").

RECITALS:

In consideration of the sum of Ten Dollars (\$10.00) and other good and valuable consideration in hand paid by Assignee to Assignor, the receipt and sufficiency of which are hereby acknowledged and confessed, Assignor and Assignee hereby agree as follows:

1. Assignor hereby assigns, transfers and sets over unto Assignee all of Assignor's right, title and interest in and to 99.9% membership interest (the Membership Interest) in Royal Palm Hotel Property, LLC (the "Company"), together with all accounts, funds and assets of any nature of the Company, whether real or personal.
2. TO HAVE AND TO HOLD the Membership Interest unto Assignee and Assignee's successors, legal representatives and assigns, forever, free from any encumbrances.
3. The intent of this Assignment is to assign to Assignee any and all rights of Assignor as stated herein and the full power to exercise any and all rights so assigned.
4. Assignor (for itself and on behalf of Assignor's legal representatives, successors and assigns) hereby warrants, represents, covenants and agrees with Assignee as follows:
 - i. That this Assignment and the conveyances being made hereby (a) are absolute conveyances to Assignee of all of Assignor's interest in the Membership Interest and all properties, rights and interests located on, affixed to, and/or arising from or used in connection with the property owned by the Company, Assignor having transferred and assigned such property to Assignee for a fair and adequate consideration, and (b) are not intended as a pledge, trust conveyance or security of any kind or nature whatsoever; and
 - ii. That Assignor has not sold, transferred or granted to any other person or entity any right, title or interest (legal, beneficial or otherwise) in the Membership Interest or the Company, and Assignor has not pledged or otherwise encumbered the Membership Interest or the Company.
5. Assignor does hereby agree to perform, execute and/or deliver or to cause to be performed, executed and/or delivered any and all such further acts and assurances as Assignee reasonably may require to perfect and convey Assignee's interest in the Membership Interest.

This Assignment shall be binding upon, and inure to the benefit of, the parties hereto and their respective successors and assigns.

IN WITNESS WHEREOF, Assignor has caused this Assignment to be executed on the day and year first above written.

ASSIGNOR:

ROYAL PALM SENIOR INVESTORS, LLC, a
Delaware limited liability company

By: _____

Name:

Title:

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1

2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK

4

5 GUY T. MITCHELL,)
6)
6 Plaintiff,) 08 Civ. 4319 (JES)
7)
7 vs.)
8)
8 CARBON CAPITAL II, INC.,)
9)
9 Defendant.)
10 -----)
11
12
13
14 VOLUME II
15
16 CONTINUED VIDEOTAPED DEPOSITION OF
17 GUY T. MITCHELL
18 New York, New York
19 Tuesday, June 10, 2008
20
21
22
23 Reported by:
24 KRISTIN KOCH, RPR, RMR, CRR, CLR
25 JOB NO. 17198

<p style="text-align: right;">Page 236</p> <p>1 2 3 4 5 June 10, 2008 6 10:07 a.m. 7 8 9 Continued Videotaped Deposition of 10 GUY T. MITCHELL, held at the offices of 11 Sidley Austin LLP, 787 Seventh Avenue, 12 New York, New York, before Kristin Koch, a 13 Registered Professional Reporter, 14 Registered Merit Reporter, Certified 15 Realtime Reporter, Certified Livenote 16 Reporter and Notary Public of the State of 17 New York. 18 19 20 21 22 23 24 25</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p style="text-align: right;">Page 237</p> <p>1 2 APPEARANCES: 3 4 5 ARNOLD & PORTER LLP 6 Attorneys for Plaintiff 7 399 Park Avenue 8 New York, New York 10022-4690 9 BY: H. PETER HAVELES, JR., ESQ. 10 11 12 SIDLEY AUSTIN LLP 13 Attorneys for Defendant 14 787 Seventh Avenue 15 New York, New York 10019 16 BY: ISAAC S. GREANEY, ESQ. 17 18 19 20 ALSO PRESENT: 21 22 MICHAEL PINEIRO, Legal Video Specialist 23 24 25</p> <p>TSG Reporting - Worldwide 877-702-9580</p>
<p style="text-align: right;">Page 238</p> <p>1 2 THE VIDEOGRAPHER: This is the start 3 of the tape labeled number 1 of the 4 continuing videotaped deposition of Guy 5 Mitchell in the matter of Mitchell versus 6 Carbon Capital, Inc. 7 This deposition is being held at 787 8 Seventh Avenue, New York, New York on June 9 10th, 2008 at approximately 10:07 a.m. 10 My name is Michael Pineiro from TSG 11 Reporting, Inc. and I am the legal video 12 specialist. The court reporter is Kristin 13 Koch in association with TSG Reporting. 14 Will counsel please introduce 15 yourselves. 16 MR. HAVELES: Peter Haveles of 17 Arnold & Porter LLP on behalf of the 18 plaintiff and the witness. 19 MR. GREANEY: Isaac Greaney from 20 Sidley Austin LLP on behalf of defendant 21 Carbon Capital II. 22 THE VIDEOGRAPHER: Will the court 23 reporter please swear in the witness. 24 * * *</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p style="text-align: right;">Page 239</p> <p>1 2 GUY T. MITCHELL, 3 resumed as a witness, having been duly sworn 4 by a Notary Public, was examined and 5 testified as follows: 6 EXAMINATION BY 7 MR. GREANEY: 8 Q. Good morning, Mr. Mitchell. 9 A. Good morning. 10 Q. Welcome back. I'll just briefly go 11 over the rules, since we already went over them 12 before. 13 If you need a break at any time, 14 please take one, let us know and we will take 15 one. 16 If you don't understand any question 17 I ask, please let me know. Can you do that? 18 A. Yes. 19 Q. And if you don't, I will assume that 20 you understand it. Is that okay? 21 A. Yes. 22 Q. Did you think of anything in the 23 past week that you'd like to clarify or change 24 about your prior testimony? 25 A. No.</p> <p>TSG Reporting - Worldwide 877-702-9580</p>

<p style="text-align: right;">Page 240</p> <p>1 Mitchell</p> <p>2 Q. Did you remember anything that you 3 couldn't remember the last time we were 4 together that you would like to include in your 5 testimony?</p> <p>6 A. No.</p> <p>7 Q. Is there any reason that you are 8 aware of why you can't testify fully and 9 accurately today?</p> <p>10 A. No.</p> <p>11 Q. Have you talked to anyone since the 12 last time we were together about your 13 deposition?</p> <p>14 A. No.</p> <p>15 Q. Even your lawyer?</p> <p>16 MR. HAVELES: Well, I direct him not 17 to answer. We have had numerous 18 conversations about various topics over the 19 last week and a half.</p> <p>20 Q. Anyone else besides your attorneys?</p> <p>21 A. No.</p> <p>22 Q. Have you reviewed the transcript of 23 your prior deposition?</p> <p>24 A. Yes.</p> <p>25 Q. When did you review that?</p>	<p style="text-align: right;">Page 241</p> <p>1 Mitchell</p> <p>2 A. I reviewed them last night.</p> <p>3 Q. When was the last time that you 4 personally invested money into the Royal Palm 5 Hotel?</p> <p>6 A. I don't recall the date.</p> <p>7 Q. Was it less than six months ago?</p> <p>8 A. No.</p> <p>9 Q. Was it less than a year ago?</p> <p>10 A. It may have been a year ago.</p> <p>11 Q. Do you remember the circumstances of 12 your investing money into the Royal Palm Hotel?</p> <p>13 A. It could have been -- be a mortgage, 14 pay mortgage, or it could have been to 15 shortfalls of the hotel.</p> <p>16 Q. And did you pay that personally or 17 through an LLC?</p> <p>18 A. Through an LLC.</p> <p>19 Q. Which one?</p> <p>20 A. Mitchell Hotel Group.</p> <p>21 Q. Do you remember how much money that 22 was, roughly?</p> <p>23 MR. HAVELES: Don't guess.</p> <p>24 A. No.</p> <p>25 MR. HAVELES: Just from your</p>
<p>TSG Reporting - Worldwide 877-702-9580</p>	<p>TSG Reporting - Worldwide 877-702-9580</p>

<p style="text-align: right;">Page 244</p> <p>1 Mitchell</p> <p>2 Q. Did you promise to renovate rooms in 3 the Shorecrest Tower?</p> <p>4 A. Yes.</p> <p>5 Q. And also in the Lanai? Excuse me, 6 the Lanai Suites.</p> <p>7 A. Yes.</p> <p>8 Q. Who did you make that promise to?</p> <p>9 A. That was basically a global 10 understanding if the funding was there to 11 complete, you know, renovation. It wasn't a 12 sequence of which rooms or whatever the case 13 was, but...</p> <p>14 MR. HAVELES: He asked to whom did 15 you make the promise.</p> <p>16 A. I maybe retract my words. The word 17 "promise" is fairly strong. You know, we were 18 going to obviously continue renovation on 19 certain rooms, but it did not make sense. We 20 actually put the rooms back together that were 21 in renovation mode to effectually generate the 22 income, which was greater than taking the rooms 23 down, so the choice was not to do any further 24 renovation. We instead enhanced a lot of the 25 corridors of the hotel and that was the basic</p> <p style="text-align: right;">TSG Reporting - Worldwide 877-702-9580</p>	<p style="text-align: right;">Page 245</p> <p>1 Mitchell</p> <p>2 recommendation versus the amount of money that 3 we had in the reserve.</p> <p>4 Q. I know you are uncomfortable now 5 with the word "promise," so you can feel free 6 to change that in your answer, but who did you 7 promise to make those renovations to?</p> <p>8 A. Well, with the word "promise," you 9 know, I don't like the word "promise," but 10 we -- it was mentioned to if -- we spoke to 11 Frank or -- Pomar, Mr. Pomar, or it could have 12 been Wachovia, but, again, the choice was not 13 to do anything else and not to do any further 14 renovation and to put the rooms that were off 15 line back on line, which occurred, because the 16 revenue was better for the hotel.</p> <p>17 Q. Were the renovations contemplated in 18 the agreement that you entered into?</p> <p>19 A. That was prior to me getting in. 20 There was an agreement, I guess, with -- I 21 don't know that there was a specific agreement. 22 I don't -- I don't recall that.</p> <p>23 Q. Do you remember the circumstances of 24 your telling Mr. Pomar that you intended to do 25 those renovations?</p> <p style="text-align: right;">TSG Reporting - Worldwide 877-702-9580</p>
<p style="text-align: right;">Page 246</p> <p>1 Mitchell</p> <p>2 A. We were going to do renovations with 3 what funds we had and the choice was not to 4 continue the reservations because it would have 5 been a huge loss in revenue, and there was not 6 enough funds to complete or do the renovation 7 of those rooms and the choice was to keep those 8 rooms on line and that's what we did.</p> <p>9 Q. Who made that choice?</p> <p>10 A. I did.</p> <p>11 Q. Did you consult with anyone about 12 that, making that choice?</p> <p>13 A. We spoke to management, that was 14 Naveen Ahuja, to keep the revenues going and 15 that was the decision we came up with.</p> <p>16 Q. Did you represent to Mr. Pomar that 17 you will do these renovations on numerous 18 occasions or just once?</p> <p>19 A. He may have brought them up numerous 20 times, but it wasn't -- it wasn't me.</p> <p>21 Q. Did Mr. Pomar discuss with you the 22 fact that you weren't going to do the 23 renovations once you had made that decision?</p> <p>24 A. I don't know, but he was fully 25 informed that the reasons why we did not do any</p> <p style="text-align: right;">TSG Reporting - Worldwide 877-702-9580</p>	<p style="text-align: right;">Page 247</p> <p>1 Mitchell</p> <p>2 further renovations, because there was -- there 3 wasn't enough money and that it was better -- 4 the hotel was much better served putting those 5 rooms back on line and doing the cosmetic stuff 6 that was needed to do, which was done.</p> <p>7 Q. You mean to do it to sell it in the 8 short term?</p> <p>9 A. To sell it in the short term and 10 also keep the revenues up without creating a 11 deficit.</p> <p>12 Q. Do you remember when that decision 13 was made that it would be better to do the more 14 minor renovations for the short-term sale 15 process?</p> <p>16 A. No. It was -- no.</p> <p>17 Q. Was it in 2006?</p> <p>18 A. I don't recall.</p> <p>19 Q. Was it before the maturity date of 20 the loans?</p> <p>21 A. I don't recall.</p> <p>22 Q. Do you remember having discussions 23 with Wachovia about renovations to the hotel?</p> <p>24 A. Not specifically.</p> <p>25 Q. What do you generally recall?</p> <p style="text-align: right;">TSG Reporting - Worldwide 877-702-9580</p>

<p style="text-align: right;">Page 248</p> <p>1 Mitchell</p> <p>2 A. I remember everybody -- we informed 3 what we were doing and kept everybody apprised 4 at all times of what the choices were and what 5 the options were.</p> <p>6 Q. And did Wachovia have any reaction 7 to that?</p> <p>8 A. No.</p> <p>9 Q. Why did you make the decision to 10 sell the hotel in the short term?</p> <p>11 A. It was better served and the market 12 was stronger and it was the opportune time to 13 sell the hotel.</p> <p>14 Q. What time was that?</p> <p>15 A. In the last two years.</p> <p>16 Q. I think the last time we spoke you 17 mentioned that the lending market had 18 deteriorated at some point in time. Was this 19 prior to that time?</p> <p>20 A. Yes.</p> <p>21 Q. I can show you the testimony if you 22 don't recall it, but last time we spoke you 23 said that sometime around March '07, roughly 24 thereabouts, you had thought the lending market 25 had turned and had gotten significantly worse</p> <p style="text-align: right;">TSG Reporting - Worldwide 877-702-9580</p>	<p style="text-align: right;">Page 249</p> <p>1 Mitchell</p> <p>2 and had remained basically unchanged up until 3 today. Does that square with your 4 recollection?</p> <p>5 A. Yes.</p> <p>6 Q. At the time that you made the 7 decision not to do the more significant 8 renovations on the Shorecrest and the Lanai 9 Suites, is that prior to the market turning in 10 March '07?</p> <p>11 A. Yes.</p> <p>12 Q. Do you know how much prior to that 13 it was?</p> <p>14 A. No.</p> <p>15 Q. When did you first start trying to 16 sell the property?</p> <p>17 A. I don't recall the date.</p> <p>18 Q. Do you recall how many years ago it 19 was?</p> <p>20 A. Greater than a year.</p> <p>21 Q. Have you been trying to sell the 22 property since the mortgage transaction in 23 2005?</p> <p>24 A. Yes.</p> <p>25 Q. Last time we were together we spoke TSG Reporting - Worldwide 877-702-9580</p>
<p style="text-align: right;">Page 250</p> <p>1 Mitchell</p> <p>2 a little bit about your communications with 3 Easdil about the property.</p> <p>4 Have you had any communications with 5 Easdil since our last deposition?</p> <p>6 A. No.</p> <p>7 Q. Has Easdil provided you with any 8 information about the sales process for the 9 property in the last two weeks?</p> <p>10 A. Yes. There was an update.</p> <p>11 Q. What did they say in the update?</p> <p>12 A. They were continuing to market the 13 property and so forth.</p> <p>14 Q. Did they tell you anything about the 15 progress on their efforts to market the 16 property?</p> <p>17 A. They are still entertaining 18 purchasers.</p> <p>19 Q. Have they had any offers?</p> <p>20 A. Not yet.</p> <p>21 Q. Any indications?</p> <p>22 A. We won't know until the offerings 23 come out.</p> <p>24 Q. Have they given you an opinion on 25 what they think a possible sales price would</p> <p style="text-align: right;">TSG Reporting - Worldwide 877-702-9580</p>	<p style="text-align: right;">Page 251</p> <p>1 Mitchell</p> <p>2 be?</p> <p>3 MR. HAVELES: Answer the question to 4 the best of your knowledge.</p> <p>5 A. Yes.</p> <p>6 Q. What was the possible sales price 7 they mentioned?</p> <p>8 A. I retract that. It's not a -- they 9 have not gone to market, so there is not a 10 specific -- there is not a specific number, you 11 know, for that. They couldn't do it. They 12 don't have bids yet.</p> <p>13 Q. In the last two weeks can you tell 14 me everything you remember about your 15 communications with Easdil?</p> <p>16 A. I haven't spoken to them.</p> <p>17 Q. You said you received an update; 18 correct?</p> <p>19 A. Just received an update, yes.</p> <p>20 Q. From -- is that via e-mail?</p> <p>21 A. Yes.</p> <p>22 Q. What did Easdil write in the e-mail?</p> <p>23 A. Easdil wrote that they were 24 continuing to market the property and that they 25 may want to defer the bidding process until we</p> <p style="text-align: right;">TSG Reporting - Worldwide 877-702-9580</p>

<p style="text-align: right;">Page 252</p> <p>1 Mitchell 2 resolve some of these issues. 3 Q. Did they say why? 4 A. Well, I think the reason why is 5 because there is litigation going on and I 6 think it's much easier for them to do what they 7 need to do without having a litigation. 8 Q. Is that what they said? 9 A. That's what I am assume -- well -- 10 MR. HAVELES: Tell him what they 11 said. He is not asking what you assume 12 they said. 13 A. I don't recall exactly what it read. 14 I don't recall. 15 Q. Did they say what -- what else do 16 you recall from the e-mail? 17 A. Basically that they would like to go 18 out a little further on the timing. 19 Q. Do you recall anything else from the 20 e-mail? 21 A. No. 22 Q. Nothing else? 23 A. I don't -- I didn't really -- I 24 didn't have time to go through the e-mail 25 because I was coming up here.</p>	<p style="text-align: right;">Page 253</p> <p>1 Mitchell 2 Q. They didn't say anything about the 3 price or the indications of the market? 4 A. I didn't get to that point. I 5 don't -- 6 Q. Was it in the e-mail? 7 A. It may have been. I don't know. 8 Q. How long was the update? 9 A. I don't know when it came in, 10 because I was out of town. 11 MR. HAVELES: How long was the 12 update, how many pages, or how long was the 13 text? 14 A. They sent an update previously and 15 it looked similar to what they had sent before 16 that just -- that they were doing more tours, 17 so I didn't read a lot of the detail. 18 Q. How long was it? 19 A. I don't know. I didn't go down that 20 far. 21 Q. Was it just an e-mail or was there 22 an attachment? 23 A. It may have been an attachment. 24 Q. But you don't recall? 25 A. It may have been an attachment. I</p>
<p style="text-align: right;">Page 254</p> <p>1 Mitchell 2 guess it showed a list of their clients. 3 Q. When you say a list of clients, do 4 you mean a list of people they have spoken with 5 about the property? 6 A. Prospective purchasers or who they 7 sent their packages out to. 8 Q. Did they provide a report on what 9 the indications were from those individuals or 10 those entities? 11 A. I just said to you I didn't read -- 12 I didn't have a chance to read the entire 13 e-mail. 14 Q. And you have had no discussions 15 orally or by any other means communicated with 16 Easdil in the last two weeks? 17 A. No. 18 Q. Other than that single e-mail? 19 A. Right. 20 Q. Where was that e-mail sent? 21 A. It was sent to FirstChoice01 at 22 AOL.com. 23 Q. So other than the statement by 24 Easdil that they were recommending deferring 25 the bidding process, you don't recall anything</p>	<p style="text-align: right;">Page 255</p> <p>1 Mitchell 2 else about that e-mail update; is that correct? 3 A. I don't recall a lot of the 4 specifics, no, because I didn't read it in its 5 entirety. 6 Q. What do you recall beyond -- 7 A. Just what I told you. 8 Q. Nothing more? 9 A. No. 10 Q. The last time we were here you 11 mentioned -- you testified that Miles Spencer 12 had e-mailed you at your personal e-mail 13 address, which I think was different than the 14 one you just gave us. 15 Do you have another personal e-mail 16 address you use? 17 A. No. 18 Q. You don't have a G Mitchell e-mail 19 address? 20 A. Yes. 21 Q. What e-mail address is that? 22 A. It's the BlackBerry. 23 Q. What is the address? 24 A. G.Mitchell at EarthLink.net. 25 Q. You mention that in that e-mail</p>

<p style="text-align: right;">Page 256</p> <p>Mitchell</p> <p>2 Miles Spencer told you that the value of the 3 property could be north of 220 million. Do you 4 recall that?</p> <p>5 A. That wasn't that specific e-mail.</p> <p>6 Q. Which e-mail was that?</p> <p>7 A. That was previous, a few -- I think 8 I told you about two months prior.</p> <p>9 Q. Has Mr. Spencer given you any 10 indication of whether the value of the property 11 in his opinion has changed since that 12 \$220 million quote?</p> <p>13 A. I haven't spoken to him in detail, 14 no.</p> <p>15 MR. HAVELES: Isaac, for the record, 16 since the receiver interjected himself in 17 the sales process, Easdil has not had any 18 voice communications of any sort with 19 Mr. Mitchell.</p> <p>20 MR. GREANEY: Okay.</p> <p>21 Q. Is that -- can I -- is that true?</p> <p>22 A. Yes.</p> <p>23 RQ MR. GREANEY: Peter, we do not -- I 24 don't believe that we have a copy of the 25 e-mail from Miles Spencer, so I would like</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p style="text-align: right;">Page 257</p> <p>Mitchell</p> <p>2 to request that that be produced if it still 3 exists.</p> <p>4 MR. HAVELES: I will check. We 5 attempted -- because it's a personal 6 address where he did not -- it doesn't have 7 a server where they get done. It's like 8 any other --</p> <p>9 MR. GREANEY: I understand.</p> <p>10 MR. HAVELES: So I will -- if he has 11 them, we will check to see. We didn't see 12 them in the productions when we collected 13 all e-mails back at the end of April. We 14 will try to see if they are still around 15 and get copies of them.</p> <p>16 MR. GREANEY: Just to be clear, we 17 request production of any responsive 18 documents in the EarthLink account as well 19 as the AOL account.</p> <p>20 MR. HAVELES: No, I understand. We 21 searched both accounts back -- we searched 22 both accounts back in April. To the extent 23 the EarthLink he uses for his BlackBerry, 24 he went into the server to see if he had 25 saved any -- or went into his BlackBerry</p> <p>TSG Reporting - Worldwide 877-702-9580</p>
<p style="text-align: right;">Page 258</p> <p>Mitchell</p> <p>2 and computer to see if he saved any and 3 same -- we did the same with the AOL e-mail 4 address as well, but we will go back and 5 conduct a further search to determine 6 whether those e-mails were saved or not.</p> <p>7 MR. GREANEY: Thank you.</p> <p>8 MR. HAVELES: But, you know, you can 9 also serve a subpoena on Easdil, because it 10 will have a server.</p> <p>11 MR. GREANEY: Okay.</p> <p>12 MR. HAVELES: And I will not 13 interpose the discovery cut-off date as an 14 obstruction -- an objection to your doing 15 so.</p> <p>16 MR. GREANEY: Okay.</p> <p>17 Q. Do you have a current belief as to 18 what the property will sell for?</p> <p>19 A. I don't know.</p> <p>20 Q. You don't have a belief as to what 21 the Royal Palm Hotel will sell for?</p> <p>22 A. I would hope north of 200.</p> <p>23 Q. And in what time frame do you hope 24 to achieve that price?</p> <p>25 A. I mentioned the other day at least a</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p style="text-align: right;">Page 259</p> <p>Mitchell</p> <p>2 March date.</p> <p>3 Q. March 2009?</p> <p>4 A. Yes.</p> <p>5 Q. So is it fair to say that you are 6 hopeful that by March 2009 you could get a 7 price north of 200 million?</p> <p>8 A. Yes.</p> <p>9 Q. Will you -- is it your intention to 10 accept the highest offer that Easdil obtains?</p> <p>11 MR. HAVELES: Well, he doesn't have 12 any authority to accept any offer at the 13 moment, so I object to that question, to 14 the extent that there is a receiver in 15 place at the moment.</p> <p>16 Q. Well, to the extent that the 17 receiver is ousted from his responsibilities by 18 the court or otherwise, would you -- is it your 19 intention to accept the highest offer received 20 by Easdil?</p> <p>21 MR. HAVELES: Objection. Vague. 22 You may answer the question.</p> <p>23 A. I would have to see what that offer 24 would be.</p> <p>25 Q. So the answer is no?</p> <p>TSG Reporting - Worldwide 877-702-9580</p>

<p style="text-align: right;">Page 260</p> <p>1 Mitchell</p> <p>2 A. No. I can't answer that question, 3 because I don't know what the offer would be.</p> <p>4 Q. Is there a minimum amount of money 5 that you would be willing to approve if you had 6 approval authority over the sales process?</p> <p>7 A. Again, I can't answer that question 8 now.</p> <p>9 Q. Why not?</p> <p>10 A. Because the sales process hasn't 11 gone through.</p> <p>12 Q. The sales process is going to take 13 place soon; is that correct?</p> <p>14 A. Well, we will see.</p> <p>15 MR. HAVELES: The sales process has 16 been under way.</p> <p>17 THE WITNESS: Right.</p> <p>18 MR. HAVELES: Mr. Mitchell --</p> <p>19 When I am speaking, you do not 20 speak.</p> <p>21 The sales process is under way.</p> <p>22 Mr. Mitchell has no control over the sales 23 process at the moment. He is entitled to 24 receive reports from Easdil, but other than 25 getting occasional reports from Easdil he</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p style="text-align: right;">Page 261</p> <p>1 Mitchell</p> <p>2 is not allowed to have any involvement in 3 the process pursuant to directions that the 4 receiver gave to Easdil, so Mr. Mitchell at 5 this particular moment in time is somewhat 6 handicapped to say what the sales process 7 is beyond what he sees in the reports or 8 what it will reasonably be able to 9 accomplish if he assumed control later this 10 summer, because what may or may not have 11 happened up to this date has not been under 12 his direction and control.</p> <p>13 Notwithstanding that, I mean, he 14 is -- you can ask him whatever questions 15 you have about his views of what he is 16 aware of in terms of the market or anything 17 else. I am just saying in terms of --</p> <p>18 MR. GREANEY: I understand.</p> <p>19 MR. HAVELES: -- institutionally, he 20 can't speak about what the process is going 21 to produce when he is not -- has no 22 responsibility or involvement in the 23 process.</p> <p>24 Q. Do you have an understanding of what 25 the process is going to be over the near term?</p> <p>TSG Reporting - Worldwide 877-702-9580</p>
<p style="text-align: right;">Page 262</p> <p>1 Mitchell</p> <p>2 A. Not the details.</p> <p>3 MR. HAVELES: To the best you can, 4 answer the question.</p> <p>5 A. The process might be delayed and we 6 need to -- you know, that's what Easdil does 7 and they do competitive marketing and sales 8 process.</p> <p>9 MR. HAVELES: The question is what 10 do you understand Easdil is trying to do 11 right now.</p> <p>12 A. Market and sell the property.</p> <p>13 Q. Do you have an understanding of 14 whether there is currently in place a date for 15 accepting offers on the hotel?</p> <p>16 A. I don't recall the date. I know 17 that they wanted to extend the date.</p> <p>18 Q. Do you recall whether the current 19 date is in the next two weeks?</p> <p>20 MR. HAVELES: I believe there is a 21 date, Mr. Greaney, for the receipt of 22 offers sometime in the near future. I 23 don't believe any date has been set, at 24 least not to our -- what we have been 25 advised by Easdil as to when offers would</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p style="text-align: right;">Page 263</p> <p>1 Mitchell</p> <p>2 be accepted. At this juncture the receiver 3 is under an order from the appellate 4 division that he cannot go forward to 5 accept any sale or transfer without the 6 approval of the court, so due to the stay 7 that -- the order that the appellate 8 division had issued back in late April or 9 early May, so I'm not sure that any date 10 has been set for acceptance of offers. I 11 believe there has been some discussion 12 about the date as to when offers would 13 begin to be received and that's the 14 postponement date to which Mr. Mitchell has 15 alluded.</p> <p>16 Q. Do you have an understanding of when 17 the date for receiving offers is currently?</p> <p>18 A. I don't know the time sequences. I 19 know it was probably in the -- within a few 20 weeks they were going to start receiving 21 offers, but I think they would like to postpone 22 that.</p> <p>23 Q. Do you know whether there has been a 24 decision to postpone it yet?</p> <p>25 A. Not yet.</p> <p>TSG Reporting - Worldwide 877-702-9580</p>

<p style="text-align: right;">Page 264</p> <p>1 Mitchell</p> <p>2 Q. Do you know -- do you have an 3 understanding of who will make that decision?</p> <p>4 A. Not yet.</p> <p>5 Q. Under the current circumstances, if 6 the decision was made today, who would make it?</p> <p>7 A. The receiver.</p> <p>8 Q. Did you agree to that arrangement?</p> <p>9 A. No.</p> <p>10 Q. You mentioned earlier that Easdil -- 11 you recall Easdil proposing or recommending 12 deferring the bidding process; correct?</p> <p>13 A. Correct.</p> <p>14 Q. And you said that you thought the 15 reason why was because of the litigation 16 issues?</p> <p>17 A. Yeah, that would --</p> <p>18 Q. Is that correct?</p> <p>19 A. Right.</p> <p>20 Q. Okay. And why would the litigation 21 issues, as you understand it, why would the 22 litigation issues warrant deferring the bidding 23 process?</p> <p>24 A. You would have to ask Easdil that.</p> <p>25 Q. Do you have an opinion yourself?</p> <p style="text-align: right;">TSG Reporting - Worldwide 877-702-9580</p>	<p style="text-align: right;">Page 265</p> <p>1 Mitchell</p> <p>2 A. It's probably confusing to the</p> <p>3 marketplace.</p> <p>4 Q. Do you think the bidding process 5 should be deferred?</p> <p>6 A. Yes.</p> <p>7 Q. And that's because it's confusing to 8 the marketplace?</p> <p>9 A. Yes.</p> <p>10 Q. In what sense is it confusing to the 11 marketplace?</p> <p>12 A. You see all litigation. I think you</p> <p>13 are confused too.</p> <p>14 MR. HAVELES: No, answer the</p> <p>15 question as to why you think it's confused.</p> <p>16 That's not an appropriate answer.</p> <p>17 A. I just think it's -- that's just</p> <p>18 what they felt.</p> <p>19 Q. No, I am asking you why you think 20 that the litigation that's going on is causing 21 confusion in the marketplace.</p> <p>22 MR. HAVELES: He is asking for your</p> <p>23 personal opinion now, not Easdil's opinion.</p> <p>24 A. I feel that people see that it would</p> <p>25 be a much greater opportunity to buy an asset</p> <p style="text-align: right;">TSG Reporting - Worldwide 877-702-9580</p>
<p style="text-align: right;">Page 266</p> <p>1 Mitchell</p> <p>2 for a lot less than the value.</p> <p>3 Q. So does that mean you think the 4 bids -- the offers will be lower than they 5 otherwise would be in the absence of 6 litigation?</p> <p>7 A. Yes.</p> <p>8 Q. Do you think it impacts the speed of 9 whether a sale takes place?</p> <p>10 MR. HAVELES: Objection to form.</p> <p>11 Vague.</p> <p>12 You may answer the question.</p> <p>13 A. No.</p> <p>14 Q. Do you believe that you would be 15 harmed by a sale price while this confusion is 16 present in the marketplace?</p> <p>17 A. Yes.</p> <p>18 Q. And how would that be?</p> <p>19 A. Well, if people are trying to buy as</p> <p>20 an opportunity in lower -- as low as possible,</p> <p>21 that affects the sales price.</p> <p>22 Q. And that would harm you how?</p> <p>23 A. Harm me because I wouldn't be -- I</p> <p>24 would be getting less equity.</p> <p>25 Q. Does it harm anyone else to get a</p> <p style="text-align: right;">TSG Reporting - Worldwide 877-702-9580</p>	<p style="text-align: right;">Page 267</p> <p>1 Mitchell</p> <p>2 lower sales price?</p> <p>3 A. Yes.</p> <p>4 Q. Who else does it harm?</p> <p>5 A. Other investors.</p> <p>6 Q. Who are those other investors?</p> <p>7 A. The Falor group, the Hockman group,</p> <p>8 and whoever their other investors may be.</p> <p>9 Q. Anyone else?</p> <p>10 A. I guess Don Peebles. I don't know</p> <p>11 all the investors' names.</p> <p>12 Q. Does it harm anyone who is 13 interested in maximizing the value of the sales 14 process?</p> <p>15 MR. HAVELES: Objection to form.</p> <p>16 A. Repeat that question.</p> <p>17 Q. Does it harm anyone whose interest 18 is in maximizing the sale value of the hotel?</p> <p>19 A. Say that again. It doesn't make</p> <p>20 sense to me, what you are asking.</p> <p>21 Q. Does it harm anyone whose interest 22 is in maximizing the sale price of the hotel?</p> <p>23 MR. HAVELES: Objection to form.</p> <p>24 Vague.</p> <p>25 A. I really don't get what you are</p> <p style="text-align: right;">TSG Reporting - Worldwide 877-702-9580</p>

<p style="text-align: right;">Page 268</p> <p>1 Mitchell 2 saying. It -- yes, it does hamper the 3 investment of the hotel to sell for a lower 4 price.</p> <p>5 Q. Well, it harms you because it would 6 sell for a lower price and you would recover 7 less on your equity; correct?</p> <p>8 A. Correct.</p> <p>9 Q. And it would harm other investors 10 for the same reason; correct?</p> <p>11 A. Correct.</p> <p>12 Q. And would it harm Black Rock or 13 Carbon Capital?</p> <p>14 A. I can't answer that question.</p> <p>15 Q. You don't know whether it would harm 16 Carbon Capital to have a lower sales price for 17 the property?</p> <p>18 A. I -- it possibly could.</p> <p>19 Q. And how could it possibly?</p> <p>20 A. If it sold for less money.</p> <p>21 Q. Less than what?</p> <p>22 A. Less than what the bids would be. I 23 don't know. You keep going on and it's getting 24 aggravating because, you know, you are trying 25 to get me to make presumptions on stuff that I</p> <p style="text-align: right;">TSG Reporting - Worldwide 877-702-9580</p>	<p style="text-align: right;">Page 269</p> <p>1 Mitchell 2 can't predict, so -- I don't know.</p> <p>3 Q. All you have to do is answer the 4 question, which is do you have an understanding 5 of whether the confusion in the marketplace 6 leading to a lower sales price would harm 7 Carbon Capital?</p> <p>8 A. I said to you it could.</p> <p>9 Q. And I asked you how.</p> <p>10 A. It could lower the sales price.</p> <p>11 Q. And how would that harm Carbon 12 Capital?</p> <p>13 A. There is sufficient equity in the 14 hotel and the hotel is worth a lot of money and 15 having -- anything affecting the value trying 16 to create a lower sales price harms anyone. 17 The hotel obviously is worth north of 18 \$200 million and if someone is thinking it's a 19 feeding frenzy or having issues, possibly it 20 could affect anybody. So I can't answer that 21 question. My feel and my belief is that the 22 property has a greater value in excess of 23 \$200 million.</p> <p>24 Q. Is it fair to say it has the -- it 25 could harm anyone who has an equity interest in</p> <p style="text-align: right;">TSG Reporting - Worldwide 877-702-9580</p>
<p style="text-align: right;">Page 270</p> <p>1 Mitchell 2 the property? 3 A. Yes.</p> <p>4 Q. We spoke last time about the lending 5 market deteriorating or taking a turn for the 6 worse in March 2007. Do you remember that?</p> <p>7 A. Yes.</p> <p>8 Q. How has that impacted your ability 9 to sell the property?</p> <p>10 A. I don't know yet.</p> <p>11 Q. You don't have an opinion of whether 12 in the last year and change the condition of 13 the lending market had an effect on your 14 ability to sell the property?</p> <p>15 A. I can't answer that question.</p> <p>16 Q. Do you have no opinion in that 17 regard?</p> <p>18 A. It depends on who the buyer would 19 be.</p> <p>20 Q. Well, does the condition of the 21 lending market have an impact on potential 22 purchasers?</p> <p>23 A. Some it may, yes.</p> <p>24 Q. In which cases would it have an 25 impact?</p> <p style="text-align: right;">TSG Reporting - Worldwide 877-702-9580</p>	<p style="text-align: right;">Page 271</p> <p>1 Mitchell 2 A. Some seeking to borrow, some 3 institutions have their own funds. So, again, 4 I say it depends on who the borrower would be.</p> <p>5 Q. And for those seeking to borrow, 6 what is the impact, as you understand it?</p> <p>7 A. Like I said the other day, it's a 8 tighter lending market.</p> <p>9 Q. I understand that, but how would 10 that impact a potential purchaser who would 11 need to borrow funds in order to purchase the 12 hotel?</p> <p>13 A. I don't know. I'm not that person. 14 I don't know what their wherewithal would be 15 and what their credentials might be.</p> <p>16 Q. Well, you said you believed it would 17 have an impact; correct?</p> <p>18 A. It's not as -- how about this: It's 19 not as easy as it was a year ago.</p> <p>20 Q. Does that affect the price available 21 for the hotel?</p> <p>22 MR. HAVELES: Objection to form. 23 Foundation.</p> <p>24 A. You are asking the same question. 25 It depends on who the buyer would be. I can't</p> <p style="text-align: right;">TSG Reporting - Worldwide 877-702-9580</p>

<p style="text-align: right;">Page 272</p> <p>1 Mitchell 2 answer that question now. 3 Q. Would it reduce the pool of 4 potential purchasers? 5 A. It may. 6 Q. And would reducing the pool of 7 potential purchasers have an impact on the 8 price? 9 A. Again, it depends on who that buyer 10 would be. 11 Q. Have you been -- from March 2008 12 until you entered into or until the receiver 13 took control of the sales process, were you 14 continuously marketing the property through 15 Easdil? 16 MR. HAVELES: Could you read the 17 question back, please. 18 (Record read.) 19 MR. HAVELES: You may answer that 20 question. 21 A. We have been marketing the property 22 through Easdil. 23 Q. Continuously? 24 A. Through what date? 25 MR. HAVELES: Since March 2008 until TSG Reporting - Worldwide 877-702-9580 </p>	<p style="text-align: right;">Page 273</p> <p>1 Mitchell 2 the receiver took over control. 3 A. Yes. 4 Q. Okay. And is it your understanding 5 that the receiver is continuing to market the 6 property through Easdil? 7 MR. HAVELES: Objection to form. 8 Foundation. 9 A. Yes. 10 Q. Has Carbon Capital interfered with 11 that marketing process? 12 A. Yes. 13 Q. In which ways? 14 A. They interfered with the sale of 15 Hyatt. 16 Q. Other than in the sale of Hyatt, 17 have they interfered with the marketing of the 18 property since March 2008? 19 A. I have no personal knowledge. 20 Q. Have you heard from anyone that 21 Carbon Capital has interfered with the 22 marketing of the property since March 2008? 23 A. No. 24 Q. Is it your understanding that the 25 first mortgage loan, the senior loan, matured TSG Reporting - Worldwide 877-702-9580 </p>
<p style="text-align: right;">Page 274</p> <p>1 Mitchell 2 on March 9th, 2007? 3 A. Yes. 4 Q. Was that the same time as the 5 mezzanine loan matured? 6 A. Yes. 7 Q. Is it your understanding that the 8 pledge under the pledge agreement we looked at 9 is for a hundred percent of the Royal Palm 10 Hotel property membership interest? 11 A. Yes. 12 Q. Do you have an understanding as to 13 the practical effect of the transfer of a 14 hundred percent of the membership interest in 15 the Royal Palm Hotel Property LLC? 16 A. Explain the question again. 17 Q. Do you have an understanding of what 18 the effect would be of transferring a hundred 19 percent of the membership interest to another 20 party? 21 A. Yes. 22 Q. What would that effect be? 23 A. Transferring a hundred percent. 24 Q. Is there any other effect of that 25 transfer? TSG Reporting - Worldwide 877-702-9580 </p>	<p style="text-align: right;">Page 275</p> <p>1 Mitchell 2 MR. HAVELES: You can answer the 3 question to the best of your ability. 4 A. No, I don't know. 5 Q. Does the person or entity that 6 controls a hundred percent of the membership 7 interest control the operation, management and 8 sales process of the hotel? 9 A. Not currently. 10 MR. HAVELES: No, he is asking 11 generally now, not currently. If there is 12 a transfer of a hundred percent of the 13 hotel company, does that party who received 14 the transfer have control over the 15 operation and the marketing -- of the hotel 16 and the sales and marketing of the hotel. 17 MR. GREANEY: Why don't I reask it. 18 MR. HAVELES: Yes, why don't you ask 19 it, because I butchered it a bit, 20 Mr. Greaney. 21 Q. Does the person or entity that 22 controls a hundred percent of the membership 23 interest control the operation, management and 24 sales process of the hotel? 25 A. Yes. TSG Reporting - Worldwide 877-702-9580 </p>

<p style="text-align: right;">Page 276</p> <p>1 Mitchell 2 MR. GREANEY: Can I mark this as 3 Mitchell Exhibit 20. 4 (Mitchell Exhibit 20, Loan Agreement 5 Dated as of February 18, 2005 between Royal 6 Palm Senior Investors, LLC as borrower and 7 Carbon Capital II, Inc. as lender, marked 8 for identification.) 9 Q. Mitchell Exhibit 20 is entitled Loan 10 Agreement Dated as of February 18, 2005 between 11 Royal Palm Senior Investors LLC as borrower and 12 Carbon Capital II, Inc. as lender. 13 Are you familiar with this document? 14 A. Yes. 15 Q. Is this the mezzanine loan 16 agreement? 17 A. Yes. 18 Q. If you could turn towards the back, 19 the signature pages. If you find page 100, 20 it's the following page. Are you there? Do 21 you see a signature there? 22 A. Yes. 23 Q. Whose signature is that? 24 A. Robert Falor. 25 Q. Was he authorized to sign on behalf TSG Reporting - Worldwide 877-702-9580</p>	<p style="text-align: right;">Page 277</p> <p>1 Mitchell 2 of Royal Palm Senior Investors LLC? 3 A. Yes. 4 Q. And to bind them to this agreement? 5 A. Yes. 6 Q. Is it your understanding that the 7 failure to pay -- to make payments under the 8 first loan was also a default under the 9 mezzanine loan? 10 MR. HAVELES: Objection to form. 11 Seeks a legal conclusion. 12 You can answer to the best of your 13 understanding. 14 A. That the fail -- say -- repeat your 15 question. 16 Q. Do you have an understanding that a 17 failure to pay under the first mortgage loan 18 was a default under the mezzanine loan? 19 A. Yes. 20 Q. Do you recall last time we looked at 21 the Settlement Agreement which was titled the 22 Settlement Agreement? 23 MR. GREANEY: Do you have a copy, 24 Peter? 25 MR. HAVELES: Yes, I do. I am just TSG Reporting - Worldwide 877-702-9580</p>
<p style="text-align: right;">Page 278</p> <p>1 Mitchell 2 scrolling down to it here. 3 MR. GREANEY: It was Exhibit 9, I 4 believe. 5 MR. HAVELES: It is, indeed, 9. 6 MR. GREANEY: Do you mind showing 7 that to Mr. Mitchell for a second. 8 MR. HAVELES: (Handing.) 9 Q. Do you recall that agreement? 10 A. Yes. 11 Q. Do you know whether Wachovia had any 12 role in the negotiations of that Settlement 13 Agreement, Exhibit 9? 14 A. No. 15 MR. HAVELES: No, you don't know? 16 A. This is a settlement agreement with 17 Black Rock. 18 MR. HAVELES: He asked did it have 19 any role. The question is do you know. 20 A. I don't know. 21 MR. HAVELES: Okay. I just wanted 22 to make sure when you said no, you don't 23 know. 24 THE WITNESS: Right. 25 Q. Did you understand whether Wachovia</p>	<p style="text-align: right;">Page 279</p> <p>1 Mitchell 2 had any input on the terms of the Settlement 3 Agreement? 4 A. No. 5 Q. Did you have any communications with 6 Wachovia about the Settlement Agreement? 7 A. Yes. 8 Q. Prior to signing it? 9 A. Not detail. They just knew that we 10 were working on a Settlement Agreement. 11 Q. Do you recall anything you had 12 talked with them about the Settlement 13 Agreement? 14 A. No. 15 Q. At the time you entered into the 16 Settlement Agreement on behalf of LLC, did -- 17 was the Royal Palm Hotel Property LLC in 18 default under the first mortgage loan? 19 A. Yes. 20 Q. Did you have an understanding of 21 whether Wachovia was going to agree to forbear 22 from exercising its remedies under the first 23 mortgage? 24 A. No. 25 Q. Did you have an understanding of -- TSG Reporting - Worldwide 877-702-9580</p>

<p style="text-align: right;">Page 280</p> <p>1 Mitchell 2 that that wouldn't happen? 3 A. Yes. 4 Q. What was your understanding? 5 A. Mr. Pomar said that he would take 6 care of Wachovia. 7 Q. Did he say anything else? 8 A. No. 9 Q. Did you have an understanding of 10 what he meant when he said that? 11 A. No. 12 Q. Did you have any concern that there 13 would be remedies -- that Wachovia would seek 14 to exercise its remedies on behalf of the first 15 mortgage lender? 16 A. I relied on Mr. Pomar. 17 Q. And to this date has Wachovia, to 18 your knowledge, has Wachovia exercised any 19 remedies on behalf of the first mortgage 20 lender? 21 A. No. 22 Q. At time you entered into that 23 Settlement Agreement, did you have -- did the 24 LLC have the ability to satisfy the obligations 25 under the first mortgage loan?</p>	<p style="text-align: right;">Page 281</p> <p>1 Mitchell 2 MR. HAVELES: Objection to form. 3 A. Ask the question again. 4 Q. At the time you entered into the 5 settlement agreement with Carbon Capital, did 6 the Royal Palm Hotel Property LLC have the 7 ability to satisfy the outstanding obligations 8 on the first mortgage? 9 A. No. 10 MR. GREANEY: I am going to use 11 number 10. I think I have copies, 12 actually. 13 MR. HAVELES: I have it. 14 MR. GREANEY: I think I have one for 15 Mr. Mitchell. 16 MR. HAVELES: I'll show it to him. 17 It's okay (handing). 18 I have put Exhibit 10 in front of 19 Mr. Mitchell at the request of Mr. Greaney. 20 Q. Mr. Mitchell, this is Exhibit 10 21 from your prior deposition entitled Limited 22 Power of Attorney. Do you remember this 23 document? 24 A. Yes. 25 Q. You signed this document; correct?</p>
<p>TSG Reporting - Worldwide 877-702-9580</p>	<p>TSG Reporting - Worldwide 877-702-9580</p>
<p style="text-align: right;">Page 282</p> <p>1 Mitchell 2 A. Yes. 3 Q. Did you have any intent when you 4 signed this document? 5 MR. HAVELES: Objection to form. 6 Vague. 7 A. You have to ask your question again. 8 Q. What was your intention when you 9 signed this Limited Power of Attorney? 10 MR. HAVELES: Objection. Vague. 11 A. I guess the document explains 12 itself. 13 Q. You didn't have any independent 14 intent from what's written on the document? 15 A. To comply with the agreement. 16 Q. What did you think that this 17 document provided for? 18 MR. HAVELES: Objection. Calls for 19 a legal conclusion. 20 You may answer the question to the 21 best of your ability. 22 A. You would have to refer back to the 23 Settlement Agreement. 24 Q. You didn't have any independent 25 understanding at the time you signed it of what</p>	<p style="text-align: right;">Page 283</p> <p>1 Mitchell 2 it is you were signing and what it was intended 3 to do? 4 A. It was a Limited Power of Attorney 5 on a certain date that would transfer 6 membership interest on April 1 and any disputes 7 were -- they were changing the independent 8 director to the person of their choice. He 9 would be a mediator as well. 10 Q. Do you have any understanding right 11 now that this Power of Attorney is invalid for 12 some reason? 13 A. Yes. 14 Q. What's your understanding? 15 A. I was told by the attorney that it 16 was invalid. 17 Q. Did you have knowledge at the time 18 you signed it that it was invalid? 19 A. That's a legal conclusion. No. 20 Q. Did you have knowledge at the time 21 you signed it that it was invalid? 22 A. No. 23 Q. Did you believe it to be invalid at 24 the time you signed it? 25 A. I'm not an attorney, so I can't</p>
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<p style="text-align: right;">Page 284</p> <p>1 Mitchell 2 answer that question. 3 MR. HAVELES: He is asking what your 4 state of mind was -- 5 A. No. 6 MR. HAVELES: -- at the time you 7 signed it. 8 Q. Did you believe it to be valid at 9 the time you signed it? 10 A. Yes. 11 Q. Under the Settlement Agreement, 12 Exhibit 9, is it your understanding that you 13 had to enter -- or the LLC had to enter into a 14 listing agreement? 15 A. Yes. 16 Q. Did you at any time enter into a 17 listing agreement on behalf of the LLC? 18 A. Yes. 19 Q. When did you enter into that listing 20 agreement? 21 A. I don't recall the dates and it was 22 with Easdin. 23 Q. This is Exhibit 17 from your last 24 deposition (handing). 25 Is that the listing agreement that TSG Reporting - Worldwide 877-702-9580</p>	<p style="text-align: right;">Page 285</p> <p>1 Mitchell 2 you were just referring to? 3 A. Yes. 4 Q. Did you enter into any prior listing 5 agreements with Easdin? 6 A. No. 7 Q. Did you enter into any other listing 8 agreements with any other party other than 9 Easdin? 10 A. There was a Hodges, Ward & Elliot, 11 there was an agreement that the Falors had with 12 them a while back. I don't know -- recall the 13 details. 14 Q. Was that prior to the date of the 15 Settlement Agreement? 16 A. Yes. 17 Q. Thank you. 18 MR. GREANEY: I think it would be 19 easier if I give him one of his own. Okay? 20 MR. HAVELES: Sure. 21 Q. Mitchell Exhibit 9, the Settlement 22 Agreement. Did you have an obligation or -- 23 excuse me. Did the LLC have an obligation 24 under this agreement to enter into a cash 25 management agreement with Wachovia? TSG Reporting - Worldwide 877-702-9580</p>
<p style="text-align: right;">Page 286</p> <p>1 Mitchell 2 A. Yes. 3 Q. I think we established last time 4 that that did not, in fact, happen; right? 5 A. No, it did happen. 6 Q. It did? When did that happen? 7 A. No, not with Wachovia, no. 8 Q. Did you enter into a cash management 9 agreement with someone else? 10 A. No. 11 MR. HAVELES: It's page 10 if you 12 are looking for the cash management 13 agreement. 14 MR. GREANEY: Thanks. 15 Q. Can you look at page 10, please, 16 section 6.3.2 of the agreement. 17 A. Okay. 18 Q. Is that the provision, as you 19 understand it, that required the LLC to enter 20 into a replacement cash management agreement? 21 A. Yes. 22 Q. Was there a lockbox set up with 23 Wachovia? 24 A. The contemplation was there to -- 25 no. No. TSG Reporting - Worldwide 877-702-9580</p>	<p style="text-align: right;">Page 287</p> <p>1 Mitchell 2 Q. Was there a Wachovia lockbox set up 3 at any time? 4 A. I don't recall. 5 Q. Who would -- who was in charge of 6 the financial accounts of the hotel? 7 A. Bill Cygnor. 8 Q. Would he have knowledge of the -- 9 would you expect him to have knowledge of 10 these -- whether there was a lockbox account 11 set up with Wachovia? 12 A. No. 13 Q. You wouldn't expect him to? 14 A. No, I -- say your question again. 15 Q. Would you expect Mr. Cygnor to have 16 knowledge of whether there was a lockbox 17 account set up with Wachovia? 18 MR. HAVELES: At any time. 19 A. Yes. 20 MR. GREANEY: Can I mark this, 21 please, as Mitchell Exhibit 21. 22 (Mitchell Exhibit 21, e-mail dated 23 November 2, 2007, Bates stamped RP 11975 24 and RP 11976, marked for identification.) 25 Q. Exhibit 21 is a series of e-mails. TSG Reporting - Worldwide 877-702-9580</p>

<p style="text-align: right;">Page 288</p> <p>1 Mitchell 2 It's Bates stamped RP 011975 to RP 011976. 3 Have you seen any of these e-mails 4 before? 5 A. Yes. 6 Q. What do you recognize them to be? 7 A. Correspondence with Wachovia. 8 Q. If you flip to the second page, 9 please, RP 011976, who is Lea Land? 10 A. She is a servicer with Wachovia. 11 Q. Is she the individual at Wachovia 12 responsible for the Royal Palm Hotel loan? 13 A. Yes. 14 Q. Do you see in the first sentence she 15 writes to Mr. Cygnor: "It is my understanding 16 that Royal Palm will be resuming remitting all 17 income to the Wachovia lockbox"? 18 A. Yes. 19 Q. Does that refresh your recollection 20 as to whether there was a lockbox set up with 21 Wachovia? 22 A. Yes. 23 Q. Okay. What do you recall now? 24 A. Basically the same thing, that it 25 was -- it was contemplated and I -- we don't</p> <p style="text-align: right;">Page 289</p> <p>1 Mitchell 2 know exactly if it was actually opened or not, 3 because the agreement was being reviewed by 4 Black Rock on the lockbox agreement and they 5 wanted us to proceed as we were doing and it 6 never happened. 7 MR. HAVELES: His question, though, 8 was what you recall about the earlier 9 lockbox or does it refresh your 10 recollection about the earlier lockbox. 11 A. You will have to ask the question 12 again. 13 Q. I had asked you whether that 14 refreshed your recollection about the Wachovia 15 lockbox and you said yes and I was just trying 16 to ask what had been refreshed and I thought 17 you were explaining it. 18 A. Well, I did. I went through the 19 whole gyration of what I thought it was, an 20 attempt to happen, but it never occurred. It 21 never -- because Frank wanted -- Mr. Pomar 22 wanted us to continue as it was going on and he 23 never made or came back on the comments on the 24 agreement that was -- he asked for comments on 25 what we thought the lockbox agreement would be</p> <p style="text-align: right;">TSG Reporting - Worldwide 877-702-9580</p>
<p style="text-align: right;">Page 290</p> <p>1 Mitchell 2 and we submitted it to him and he wanted to 3 hold onto it. 4 Q. Okay. So, to your knowledge, there 5 was never a Wachovia lockbox set up? 6 A. I didn't say that. I said it was -- 7 I don't know that it actually -- it was being 8 contemplated being done, but it was not -- it 9 didn't go forward because we didn't have an 10 agreement in place. 11 Q. But do you understand whether or not 12 there was a lockbox account set up with 13 Wachovia? 14 A. No. 15 MR. GREANEY: Can you mark that as 16 Mitchell Exhibit 22, please. 17 (Mitchell Exhibit 22, e-mail dated 18 November 19, 2007, Bates stamped RP 9426, 19 marked for identification.) 20 Q. Mitchell Exhibit 22 is a redacted 21 document with an e-mail. It's Bates stamped 22 RP 009426. 23 MR. HAVELES: For the record, as we 24 stated in our privilege log, the redacted 25 text is merely the transmission with</p> <p style="text-align: right;">Page 291</p> <p>1 Mitchell 2 comments by Mr. Mitchell to us from this 3 e-mail mailbox. 4 Q. Have you seen this e-mail before? 5 A. Yes. 6 Q. Okay. As of November 19th had you 7 made a proposal to Mr. Pomar about the Wachovia 8 cash management agreement? 9 A. Don't know the dates, but I believe 10 so, yes. 11 Q. Do you know what he is seeking from 12 you in this e-mail? 13 A. Wanted us to know how we wanted to 14 make payments, how this would work, how bills 15 would be paid as they were directing him 16 previously. 17 Q. And did you get back to him on this? 18 A. Yes. 19 Q. Did you send him a draft agreement? 20 A. Yes. 21 Q. When did you first meet Bill Cygnor? 22 A. I don't recall the dates. 23 Q. How long ago was it, approximately? 24 A. I'm sure it's over two years. 25 Q. That's the first time you met him</p> <p style="text-align: right;">TSG Reporting - Worldwide 877-702-9580</p>

<p>1 Mitchell</p> <p>2 was two years ago?</p> <p>3 MR. HAVELES: Objection. He said</p> <p>4 over two years.</p> <p>5 A. I believe it -- I believe it's been</p> <p>6 in excess of two years.</p> <p>7 Q. Okay. How -- what was the</p> <p>8 circumstances the first time you met him?</p> <p>9 A. Introduced himself to me.</p> <p>10 Q. Where was that?</p> <p>11 A. I believe at the hotel.</p> <p>12 Q. Was he applying for a job?</p> <p>13 A. No.</p> <p>14 Q. Had he already been hired?</p> <p>15 A. Yes.</p> <p>16 Q. And you didn't know him before that</p> <p>17 date?</p> <p>18 A. No.</p> <p>19 Q. Did you have any involvement in</p> <p>20 hiring him?</p> <p>21 A. No.</p> <p>22 Q. Do you know who made the decision to</p> <p>23 hire him?</p> <p>24 MR. HAVELES: Objection to form.</p> <p>25 Foundation.</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 Mitchell</p> <p>2 A. No.</p> <p>3 Q. Do you have any business interests</p> <p>4 right now with Mr. Cygnor?</p> <p>5 A. No.</p> <p>6 Q. Do you have an understanding of</p> <p>7 where operating income from the hotel was</p> <p>8 deposited?</p> <p>9 A. Yes.</p> <p>10 Q. What's your understanding?</p> <p>11 MR. HAVELES: At any time or at a</p> <p>12 particular moment in time?</p> <p>13 Q. After the Settlement Agreement.</p> <p>14 A. The same bank, I believe. I -- same</p> <p>15 bank it's been in.</p> <p>16 Q. Do you know which bank that is?</p> <p>17 A. Regions.</p> <p>18 Q. Were there any other accounts that</p> <p>19 money went into from the hotel?</p> <p>20 MR. HAVELES: Any accounts or banks?</p> <p>21 MR. GREANEY: Any banks, other than</p> <p>22 Regions.</p> <p>23 A. You will have to explain your</p> <p>24 question.</p> <p>25 MR. HAVELES: Were there any other</p> <p>TSG Reporting - Worldwide 877-702-9580</p>
<p>Page 294</p> <p>1 Mitchell</p> <p>2 banks other than Regions into which money</p> <p>3 was deposited from the hotel.</p> <p>4 A. Not that I'm aware of.</p> <p>5 Q. Earlier you mentioned that Frank</p> <p>6 Pomar, I believe, told you that he would stop</p> <p>7 Wachovia from exercising its remedies under the</p> <p>8 first mortgage; is that correct?</p> <p>9 MR. HAVELES: Objection to form.</p> <p>10 Mischaracterizes his testimony.</p> <p>11 A. Yeah, you are rephrasing what I</p> <p>12 said.</p> <p>13 Q. Okay. What did you say?</p> <p>14 A. He said he would take care of</p> <p>15 Wachovia.</p> <p>16 Q. All right. And do you know what he</p> <p>17 did in that regard?</p> <p>18 A. No.</p> <p>19 Q. Is it your understanding that Carbon</p> <p>20 Capital II has taken some action to induce</p> <p>21 Wachovia to forbear from exercising its</p> <p>22 remedies on the first mortgage?</p> <p>23 A. No.</p> <p>24 Q. Do you have any opinion as to why</p> <p>25 Wachovia has not exercised remedies under the</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>Page 295</p> <p>1 Mitchell</p> <p>2 first mortgage?</p> <p>3 A. No.</p> <p>4 Q. Is that a source of concern for you?</p> <p>5 MR. HAVELES: Objection to form.</p> <p>6 Vague.</p> <p>7 A. Yes.</p> <p>8 MR. HAVELES: It's the antecedent.</p> <p>9 Q. Yes? Why does it concern you?</p> <p>10 A. Create foreclosure.</p> <p>11 Q. What would be the impact if Wachovia</p> <p>12 foreclosed?</p> <p>13 A. They would -- the hotel would end up</p> <p>14 in bankruptcy.</p> <p>15 Q. In bankruptcy? Is that -- why do</p> <p>16 you say that?</p> <p>17 A. If they foreclosed on the hotel.</p> <p>18 Q. Would that harm you?</p> <p>19 A. Yes.</p> <p>20 Q. In the same ways as when we</p> <p>21 discussed earlier if Carbon Capital foreclosed</p> <p>22 on the membership interest?</p> <p>23 A. Yes.</p> <p>24 Q. Do you have an understanding of</p> <p>25 whether a Wachovia foreclosure would harm</p> <p>TSG Reporting - Worldwide 877-702-9580</p>

<p style="text-align: right;">Page 296</p> <p>1 Mitchell 2 Carbon Capital? 3 A. No. 4 Q. You recall last time we were here 5 that you spoke about Hyatt issuing a soft 6 termination of your purchase and sale 7 agreement? 8 A. Yes. 9 Q. Do you recall when that was? 10 A. Not the date, no. 11 MR. GREANEY: Mark this, please, as 12 Mitchell Exhibit 22. 13 MR. HAVELES: 23. 14 MR. GREANEY: 23. 15 (Mitchell Exhibit 23, Facsimile 16 Transmission dated January 28, 2008 Bates 17 stamped RP 9232, with letter dated January 18 28, 2008, Bates stamped RP 9233 and 19 RP 9234, marked for identification.) 20 Q. Mitchell number 23 is Bates stamped 21 RP 009232 through RP 009234. 22 A. Okay. 23 Q. Mr. Mitchell, the second page -- on 24 the second page there is a letter here. Is 25 this the soft termination?</p>	<p style="text-align: right;">Page 297</p> <p>1 Mitchell 2 A. Yes. 3 Q. After the soft termination do you 4 have an understanding of why no deal was 5 accomplished with Hyatt? 6 MR. HAVELES: Objection to form. 7 Foundation. 8 You can answer the question the best 9 you can. 10 A. No. 11 Q. Do you know who David Tarr is? 12 A. Yes. 13 Q. Who is David Tarr? 14 A. He is one of the directors. 15 Q. Of? 16 A. Hyatt. 17 Q. Did he have a role in your 18 negotiations over the purchase and sale 19 agreement? 20 A. Yes. 21 Q. What was his role? 22 A. He negotiated the agreement. 23 Q. Was he the principal negotiator in 24 the agreement? 25 A. Yes.</p>
<p style="text-align: right;">Page 298</p> <p>1 Mitchell 2 MR. GREANEY: Mark this, please, as 3 Mitchell Exhibit 24. 4 (Mitchell Exhibit 24, Affidavit of 5 David Tarr, marked for identification.) 6 Q. Have you seen this affidavit before, 7 Mr. Mitchell? 8 (Document review.) 9 A. No. 10 Q. Take a look at page 2, paragraph 5. 11 Are you aware of the e-mail 12 communication and voicemail message that 13 Mr. Tarr is referring to in this paragraph of 14 his affidavit? 15 A. Yes. 16 Q. Do you see paragraph 6? 17 A. Yes. 18 Q. Where Mr. Tarr writes: "At the time 19 I made the Mitchell communications I had no 20 knowledge of any Settlement Agreement between 21 Carbon Capital and Royal Palm." 22 A. Yes. 23 Q. Do you have any reason to believe 24 that Mr. Tarr is not being truthful in that 25 paragraph?</p>	<p style="text-align: right;">Page 299</p> <p>1 Mitchell 2 A. I can't answer that question. 3 Q. The question is whether you have any 4 reason to believe. 5 A. I don't know through him, but we 6 feel very strongly that there is a lot of smoke 7 that's been circulating and I can't evaluate 8 that right now. 9 Q. The question is do you have any 10 reason to believe that Mr. Tarr is not being 11 truthful in this statement? 12 A. I can't answer that question. I 13 don't know. 14 Q. So you have no reason to believe he 15 is being untruthful? 16 MR. HAVELES: He said "I don't 17 know." 18 A. I don't know. 19 MR. HAVELES: That was his answer, 20 Mr. Greaney. 21 Q. How can you not know whether you 22 have a reason to believe something? 23 MR. HAVELES: Objection to form. 24 Argumentative. 25 You may answer the question to the</p>

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<p style="text-align: right;">Page 300</p> <p>1 Mitchell 2 extent you can. 3 Q. Take a look at paragraph 7. 4 Mr. Tarr writes: "At the time that I made the 5 Mitchell communications I had no knowledge that 6 March 31, 2008 was a significant date to Royal 7 Palm or Carbon Capital." 8 Do you have any reason to believe 9 Mr. Tarr is being untruthful in that statement? 10 A. I can't answer the question. I 11 don't know. 12 Q. In paragraph 8 Mr. Tarr writes: "On 13 or before the time I made the Mitchell 14 communications no one at Carbon Capital or any 15 party related to Carbon Capital communicated 16 with me regarding the Royal Palm." 17 Do you have any reason to believe 18 Mr. Tarr is being untruthful in that paragraph? 19 A. I can't answer that question. I 20 don't know. 21 Q. In paragraph number 9 Mr. Tarr 22 writes: "I requested the extension of time 23 from Mr. Mitchell because Hyatt needed more 24 time to evaluate the purchase of the hotel from 25 Royal Palm." TSG Reporting - Worldwide 877-702-9580 </p>	<p style="text-align: right;">Page 301</p> <p>1 Mitchell 2 Do you have any reason to believe 3 that's an untruthful statement? 4 A. Again, it's the same thing. I can't 5 answer that question. 6 Q. In paragraph 10 he writes: "To my 7 knowledge I have never had any conversation 8 with anyone at Carbon Capital regarding any 9 prospective purchase by Hyatt." 10 Do you see that? 11 A. Yes. 12 Q. Do you have any reason to believe 13 that that's an untruthful statement? 14 A. Not sure. I don't know. 15 Q. In paragraph 11 he writes: "No one 16 at Hyatt ever indicated to me that the reason 17 for delaying the closing date to April 1, 2008 18 was because of anything having to do with 19 Carbon Capital or its Settlement Agreement with 20 Royal Palm." 21 Do you see that? 22 A. Yes. 23 Q. Do you have any reason to believe 24 that's an untruthful statement? 25 A. I don't know. TSG Reporting - Worldwide 877-702-9580 </p>
<p style="text-align: right;">Page 302</p> <p>1 Mitchell 2 Q. With respect to paragraphs 6 through 3 11 of this affidavit, do you have any reason to 4 believe Mr. Tarr is mistaken about some fact? 5 A. Again, I can't -- 6 MR. HAVELES: Objection to form. 7 Vague. 8 A. I can't answer that question. 9 Q. Do you have any reason to believe 10 that he is under some type of misapprehension 11 with respect to any of these statements he has 12 made? 13 A. I can't answer that question either. 14 Q. How long have you dealt with 15 Mr. Tarr? 16 A. Only through the contract, from 17 point of working on the contract of the 18 purchase. 19 MR. HAVELES: Is this a good time to 20 take a break? 21 MR. GREANEY: Sure. 22 THE VIDEOGRAPHER: The time is 23 11:21. This is the end of the tape labeled 24 number 1. We are going off the record. 25 (Recess was taken from 11:21 to TSG Reporting - Worldwide 877-702-9580 </p>	<p style="text-align: right;">Page 303</p> <p>1 Mitchell 2 11:32.) 3 THE VIDEOGRAPHER: This is the start 4 of the tape labeled number 2. The time is 5 11:32. We are back on the record. 6 BY MR. GREANEY: 7 Q. Mr. Mitchell, is there anything from 8 our earlier session that you want to clarify or 9 change? 10 A. Not right yet, no. 11 Q. I'm sorry, I didn't hear you. 12 A. I said no. 13 Q. Is there anything that you recall 14 now that you couldn't remember before? 15 A. No. 16 Q. If you could take a look at 17 Exhibit 9, which is the Settlement Agreement. 18 A. Okay. 19 Q. If you take a look at page 7, 20 paragraph 3.6, do you see that provision? 21 (Document review.) 22 A. Yes. 23 Q. Is this the provision under which 24 you believe Carbon Capital was required to pay 25 certain interest payments under the first TSG Reporting - Worldwide 877-702-9580 </p>

<p style="text-align: right;">Page 304</p> <p>1 Mitchell 2 mortgage loan? 3 A. Yes. 4 Q. Do you see in the middle of the 5 paragraph the clause that reads: "In the event 6 and to the extent that available funds from 7 operations after payment of items contemplated 8 by the cash management agreement are 9 insufficient to fully pay such monthly debt 10 service," do you see that clause? 11 A. Yes. 12 Q. I think you testified earlier that 13 there was no cash management agreement in 14 place? 15 A. Yes. 16 Q. And do you know whether Royal Palm 17 Hotel made any payments to Wachovia for the 18 first mortgage loan in the months of October 19 2007, November 2007, December 2007 and January 20 2008? 21 A. No. 22 Q. You don't know? 23 A. They did not. 24 Q. They did not make the payments? 25 A. No.</p>	<p style="text-align: right;">Page 305</p> <p>1 Mitchell 2 Q. If you read the next sentence down 3 that begins "each senior loan advance," do you 4 see that? 5 A. Yes. 6 Q. Was it your understanding that any 7 amounts paid by Carbon Capital would be added 8 to the principal amount of debt that you owed 9 Carbon Capital? 10 A. Yes. 11 Q. Do you have an understanding of 12 whether the interest rate for the debt owed to 13 Carbon Capital was higher or lower than the 14 interest rate owed to Wachovia under the first 15 mortgage? 16 A. Higher. 17 MR. GREANEY: Can I enter this as 18 Mitchell Exhibit 24, please. 19 MR. HAVELES: 25. 20 MR. GREANEY: 25. 21 (Mitchell Exhibit 25, e-mail dated 22 March 17, 2008, Bates stamped Carbon 7499 23 and Carbon 7500, marked for 24 identification.) 25 Q. Mitchell 25 is Bates stamped Carbon TSG Reporting - Worldwide 877-702-9580</p>
<p style="text-align: right;">Page 306</p> <p>1 Mitchell 2 0007499 to 0007500. 3 Have you ever seen this e-mail? 4 (Document review.) 5 Q. You are not listed as a recipient, 6 so if you don't otherwise recall it -- 7 A. Yeah, I don't recall. Yeah, no, I 8 don't recall it. I'm just -- no. 9 Q. Take a look at chart, the attached 10 chart to the e-mail. Have you ever seen this 11 document before? 12 (Document review.) 13 A. Not specifically, I don't think. 14 Q. Have you seen documents that set 15 forth the amounts owed under the first 16 mortgage? 17 MR. HAVELES: Generally or for -- 18 MR. GREANEY: Just generally. Well, 19 he said -- 20 A. Generally I have seen them. Yeah, I 21 have seen them. 22 Q. This indicates, as far as I can 23 tell, that \$1.47 million, approximately, had 24 been received by Wachovia between September 7th 25 and March 8th. Does that comport with your</p>	<p style="text-align: right;">Page 307</p> <p>1 Mitchell 2 understanding of how much was paid? 3 MR. HAVELES: Objection to form. 4 Foundation. 5 A. Yeah, I don't know the exact 6 amounts. 7 Q. Do you have an idea of how much was 8 paid -- 9 A. No. 10 Q. -- by the Royal Palm Hotel Property 11 LLC to Wachovia? 12 A. It would have been whatever the 13 statement would have been for that month. 14 Q. So it's your understanding that you 15 paid the outstanding amount each month? 16 MR. HAVELES: Objection to form. 17 Foundation. 18 A. The amount that was listed on the 19 statement was forwarded to Wachovia. 20 Q. Okay. And that was in each month 21 from between the Settlement Agreement through 22 March 2008? 23 A. That was through, I believe, March. 24 I'm not sure of the dates, but... 25 Q. Who was responsible for actually TSG Reporting - Worldwide 877-702-9580</p>

<p style="text-align: right;">Page 308</p> <p>1 Mitchell 2 making the payment? 3 A. Bill Cygnor. 4 Q. I show you Exhibit 1 from the last 5 time, which is the First Amended Complaint. 6 (Document review.) 7 Q. Can you take a look at paragraph 1, 8 please. 9 A. Okay. 10 MR. GREANEY: Do you have it, Peter? 11 MR. HAVELES: I know what it is. Go 12 ahead. 13 MR. GREANEY: I have another copy if 14 you -- 15 MR. HAVELES: No, it's all right. 16 They just didn't put it in what they sent 17 me. Thank you. 18 Q. The first paragraph of the Complaint 19 reads: "This is an action for declaratory 20 judgement and injunctive relief to prevent 21 Carbon Capital from interfering with 22 plaintiff's right and ability to manage and 23 market for sale the Royal Palm Hotel," and it 24 continues, but do you see that? 25 A. Yes.</p> <p style="text-align: right;">TSG Reporting - Worldwide 877-702-9580</p>	<p style="text-align: right;">Page 309</p> <p>1 Mitchell 2 Q. At the current time are you aware of 3 Carbon Capital interfering with the plaintiff's 4 right to manage the hotel? 5 MR. HAVELES: As we sit here today 6 in the deposition? 7 MR. GREANEY: Yes. 8 MR. HAVELES: You may answer the 9 question. 10 A. Yes. 11 Q. In which way? 12 A. They interfered with our capital 13 event. 14 MR. HAVELES: No, he is asking is 15 there anything going on presently. 16 A. Presently, no. 17 Q. Is there -- are you aware at the 18 present time of whether Carbon Capital is 19 taking any action to interfere with the 20 plaintiff's ability to market for sale the 21 Royal Palm Hotel? 22 A. I don't know. 23 Q. What is your -- do you have an 24 understanding of who currently manages and 25 controls the Royal Palm Hotel?</p> <p style="text-align: right;">TSG Reporting - Worldwide 877-702-9580</p>
<p style="text-align: right;">Page 310</p> <p>1 Mitchell 2 A. Yes. 3 Q. Who is currently managing and 4 operating the Royal Palm Hotel? 5 A. The receiver, which is -- has 6 created the issues. 7 Q. What issues? 8 A. The receiver. 9 Q. Okay. Is that Judge Albert 10 Rosenblatt? 11 A. Yes. 12 Q. Did you enter into an agreement with 13 the receiver regarding the operation and 14 management of the hotel? 15 A. Yes. 16 MR. GREANEY: Can I enter this, 17 please, as Mitchell Exhibit 26. 18 (Mitchell Exhibit 26, Stipulation, 19 marked for identification.) 20 Q. Mitchell Exhibit 26 is a Stipulation 21 of the date and time stamp at the top of 22 5-19-08, 3:45 p.m. 23 Do you recognize this document, 24 Mr. Mitchell? 25 A. Yes.</p> <p style="text-align: right;">TSG Reporting - Worldwide 877-702-9580</p>	<p style="text-align: right;">Page 311</p> <p>1 Mitchell 2 Q. What do you recognize it to be? 3 A. It appoints the receiver to manage 4 assets. 5 Q. Are you aware of any -- have you 6 made or anyone on your behalf made any 7 agreements with the receiver that's not 8 reflected in this stipulation? 9 A. No. 10 Q. Have you made any promises to the 11 receiver that aren't set forth in this 12 stipulation? 13 A. No. 14 Q. Has the receiver or any of his 15 representatives made any promises to you that 16 aren't set forth in this stipulation? 17 A. No. 18 Q. As you sit here today, do you -- 19 have you performed all of the things you agreed 20 to do under this stipulation? 21 A. Yes. 22 Q. To your knowledge, has the receiver 23 performed all of the obligations and things he 24 agreed to do under this stipulation? 25 A. I don't know that question.</p> <p style="text-align: right;">TSG Reporting - Worldwide 877-702-9580</p>

<p style="text-align: right;">Page 312</p> <p>1 Mitchell</p> <p>2 Q. To your knowledge.</p> <p>3 A. I -- that I can't answer the</p> <p>4 question.</p> <p>5 Q. Are you aware of him breaching this</p> <p>6 agreement in any way?</p> <p>7 A. That's a legal question, so I</p> <p>8 can't -- that's difficult to answer.</p> <p>9 Q. Well, do you have an opinion as to</p> <p>10 whether he has not done anything he promised to</p> <p>11 do in this agreement?</p> <p>12 A. I can't answer that question. I</p> <p>13 don't know.</p> <p>14 MR. GREANEY: Can we go off the</p> <p>15 record for a second.</p> <p>16 MR. HAVELES: Sure.</p> <p>17 THE VIDEOGRAPHER: The time is</p> <p>18 11:45. We are going off the record.</p> <p>19 (Recess was taken from 11:45 to</p> <p>20 11:47.)</p> <p>21 THE VIDEOGRAPHER: The time is</p> <p>22 11:47. We are back on the record.</p> <p>23 BY MR. GREANEY:</p> <p>24 Q. Are you familiar with the financial</p> <p>25 condition of the Royal Palm Hotel currently?</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p style="text-align: right;">Page 313</p> <p>1 Mitchell</p> <p>2 MR. HAVELES: I will stipulate he</p> <p>3 has not seen any financial statements since</p> <p>4 the receiver has taken -- asserted control</p> <p>5 over the hotel.</p> <p>6 Q. Okay. And was that on March -- or</p> <p>7 May 19th, the date of the Stipulation, that the</p> <p>8 receiver took control?</p> <p>9 A. I don't know if I saw anything</p> <p>10 between that date, but -- or not.</p> <p>11 Q. Prior to the --</p> <p>12 A. Recently.</p> <p>13 Q. I'm sorry, I cut you off.</p> <p>14 A. Not recently. Not within the last</p> <p>15 several weeks.</p> <p>16 Q. Okay. Prior to entering into this</p> <p>17 agreement with the receiver, were you familiar</p> <p>18 with the financial condition of the Royal Palm</p> <p>19 Hotel?</p> <p>20 A. Yes.</p> <p>21 Q. Do you have a general understanding</p> <p>22 of the hotel's assets and liabilities?</p> <p>23 For each of these questions will be</p> <p>24 as of the time that you ceded control of the</p> <p>25 hotel to the receiver.</p> <p>TSG Reporting - Worldwide 877-702-9580</p>
<p style="text-align: right;">Page 314</p> <p>1 Mitchell</p> <p>2 A. Yes.</p> <p>3 Q. Do the liabilities of the hotel</p> <p>4 include the loan, outstanding loan on the first</p> <p>5 mortgage?</p> <p>6 A. Yes.</p> <p>7 Q. Do the liabilities of the hotel</p> <p>8 include the outstanding debt on the mezz loan</p> <p>9 to Carbon Capital?</p> <p>10 A. Yes.</p> <p>11 MR. GREANEY: Mark this as Mitchell</p> <p>12 Exhibit 227, please.</p> <p>13 (Mitchell Exhibit 227, Royal Palm</p> <p>14 Hotel Balance Sheet as at January-07, Bates</p> <p>15 stamped RP 11250 through RP 11252; Royal</p> <p>16 Palm Hotel Balance Sheet as at February-07,</p> <p>17 Bates stamped RP 11247 through RP 11249;</p> <p>18 Royal Palm Hotel Balance Sheet as at</p> <p>19 March-07, Bates stamped RP 11258 through RP</p> <p>20 11260; Royal Palm Hotel Balance Sheet as at</p> <p>21 April-07, Bates stamped RP 11241 through RP</p> <p>22 11243; Royal Palm Hotel Balance Sheet as at</p> <p>23 May-07, Bates stamped RP 11261 through RP</p> <p>24 11263; Royal Palm Hotel Balance Sheet as at</p> <p>25 June-07, Bates stamped RP 11255 through RP</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p style="text-align: right;">Page 315</p> <p>1 Mitchell</p> <p>2 11257; Royal Palm Hotel Balance Sheet as at</p> <p>3 July-07, Bates stamped RP 11253 through RP</p> <p>4 11254; Royal Palm Hotel Balance Sheet as at</p> <p>5 August-07, Bates stamped RP 11244 through</p> <p>6 RP 11246; Royal Palm Hotel Balance Sheet as</p> <p>7 at September-07, Bates stamped RP 7533 and</p> <p>8 RP 7534; Royal Palm Hotel Balance Sheet as</p> <p>9 at October-07, Bates stamped RP 11264 and</p> <p>10 RP 11265; Royal Palm Hotel Balance Sheet as</p> <p>11 at November-07, Bates stamped RP 5180 and</p> <p>12 RP 5181; Royal Palm Hotel Balance Sheet as</p> <p>13 at December-07, Bates stamped RP 5136 and</p> <p>14 RP 5137; Royal Palm Hotel Balance Sheet as</p> <p>15 at February-08, Bates stamped RP 1462 and</p> <p>16 RP 1463, and Royal Palm Hotel Balance Sheet</p> <p>17 as at March-08, Bates stamped RP 1419 and</p> <p>18 RP 1420, marked for identification.)</p> <p>19 Q. Mitchell 27 is a collection of</p> <p>20 documents entitled Royal Palm Hotel Balance</p> <p>21 Sheet, each month from January '07 to March</p> <p>22 '08, with the exception of January '08.</p> <p>23 Do you recognize these documents,</p> <p>24 Mr. Mitchell?</p> <p>25 A. Yes.</p> <p>TSG Reporting - Worldwide 877-702-9580</p>

<p style="text-align: right;">Page 316</p> <p>1 Mitchell 2 Q. What do you recognize them to be? 3 A. Balance sheets for the hotel. 4 Q. Did you prepare these documents? 5 A. No. 6 Q. Who prepared them? 7 A. The hotel accounting. 8 Q. And are these corporate records of 9 the Royal Palm Hotel? 10 A. Yes. 11 Q. Did you review these documents on a 12 monthly basis? 13 A. Informally. 14 Q. Were they sent to you each month? 15 A. No. 16 Q. Were they made available for your 17 review each month? 18 A. Yes. 19 Q. If you look at the first page of the 20 January '07 balance sheet, Bates stamped 21 RP 011250, do you see there is a line item for 22 Wachovia lockbox? 23 MR. HAVELES: Do you see that, 24 Mr. Mitchell? 25 A. Yes.</p> <p style="text-align: right;">TSG Reporting - Worldwide 877-702-9580</p>	<p style="text-align: right;">Page 317</p> <p>1 Mitchell 2 Q. I will represent to you, you can 3 verify if you would like, but that in each one 4 of these balance sheets there is a line for 5 Wachovia lockbox. 6 A. Yes. 7 Q. Does this refresh your recollection 8 as to whether the Royal Palm Hotel had set up 9 an existing Wachovia lockbox at the time of the 10 Settlement Agreement? 11 A. No. 12 MR. HAVELES: Objection to form. 13 Q. If you look down, please, at Other 14 Receivables, do you see a listing there for 15 Breakwater A/R and Hotel 71 A/R? 16 A. Yes. 17 Q. Do you know what those represent? 18 A. They represent what they say. 19 Q. Do you know what the account 20 receivable to Hotel 71 was? 21 MR. HAVELES: From 71, not to. 22 THE COURT REPORTER: I'm sorry? 23 MR. HAVELES: From, not to, because 24 it's a receivable. 25 A. No.</p> <p style="text-align: right;">TSG Reporting - Worldwide 877-702-9580</p>
<p style="text-align: right;">Page 318</p> <p>1 Mitchell 2 Q. Do you know what the Breakwater 3 account receivable was for? 4 A. No. 5 Q. Who would know that? 6 A. Bill Cygnor. 7 Q. Take a look at the second page of 8 the January balance sheet, which is RP 011251. 9 Under Liabilities do you see the 10 line item for Guy Mitchell A/P? 11 A. Yes. 12 Q. And it's in the amount of 13 \$9,899,909.50? 14 A. Yes. 15 Q. What does that relate to? 16 A. I'm not sure how that line item is 17 broken out. 18 Q. Did the Royal Palm Hotel owe you 19 money in January of 2007? 20 A. Yes. 21 Q. What did they owe you money -- what 22 did it owe you money for? 23 A. I said previously, I funded the 24 hotel since -- you know, for a long time. 25 Q. And I believe before you couldn't</p> <p style="text-align: right;">TSG Reporting - Worldwide 877-702-9580</p>	<p style="text-align: right;">Page 319</p> <p>1 Mitchell 2 recall whether you funded it personally or 3 through an LLC; is that correct? 4 MR. HAVELES: Objection. I think he 5 did say he recalled. 6 THE COURT REPORTER: I'm sorry, I 7 didn't hear you. 8 MR. HAVELES: Objection. I said I 9 did -- I think he did say he recalled. 10 Q. So what do you recall, that you 11 funded it personally? 12 A. I funded through Mitchell Hotel 13 Group. 14 Q. Do you know why it's not listed as 15 Mitchell Hotel Group here? 16 A. Again, I don't recall what these -- 17 you know, what that amount is. 18 Q. If you look on the third page, 19 RP 011252, do you see the section on long-term 20 liabilities? 21 A. Right. 22 Q. Does that list the principal amount 23 of the mortgage loan and the mezzanine loan? 24 A. Yes. 25 Q. Does that listing include the</p> <p style="text-align: right;">TSG Reporting - Worldwide 877-702-9580</p>

<p style="text-align: right;">Page 320</p> <p>1 Mitchell 2 interest owed on those two loans? 3 A. No. 4 Q. Why not? 5 MR. HAVELES: Objection to form. 6 Foundation. 7 A. I don't know. 8 Q. Do you believe that the interest 9 amounts owed under those two loans are 10 liabilities of the Royal Palm Hotel? 11 A. Again, I don't know how the 12 accounting procedure with that particular -- 13 how that is done. 14 Q. Do you consider the interest owed on 15 those two loans to be liabilities of the hotel? 16 A. I'm not an accountant. I don't know 17 how that -- again, that's not what I do. 18 Q. Take a look at the March '07 balance 19 sheet. On the second page, which is RP 011259, 20 do you see the current liability again for Guy 21 Mitchell A/P? 22 MR. HAVELES: Do you see it? 23 THE WITNESS: No. 24 MR. HAVELES: It's line 2009 of the 25 current liabilities.</p>	<p style="text-align: right;">Page 321</p> <p>1 Mitchell 2 THE WITNESS: It's in the back? 3 MR. HAVELES: Second page. 4 A. Yes. 5 Q. And that amount is approximately 6 \$2.72 million. Do you see that? 7 A. Yes. Yes. 8 Q. Do you recall being paid back by the 9 hotel between January and March of 2007 10 approximately \$7 million? 11 A. Say that again. 12 Q. Do you recall the hotel paying you 13 back approximately \$7 million between January 14 '07 and March '07? 15 A. No. 16 Q. If you flip one page forward from 17 that -- 18 A. Forward? 19 MR. HAVELES: To the last page of 20 the first page of this -- the financial 21 statement. 22 Q. The first page of March '07. It's 23 probably best we use the Bates numbers. It's 24 RP 011258. They are not in order, but just to 25 confirm we are on the same page.</p>
<p>TSG Reporting - Worldwide 877-702-9580</p>	<p>TSG Reporting - Worldwide 877-702-9580</p>
<p style="text-align: right;">Page 322</p> <p>1 Mitchell 2 Do you see the Hotel 71 account 3 receivable entry there? 4 MR. HAVELES: On the first page of 5 the March '07 balance sheet. 6 A. Yes. 7 Q. And that indicates \$3,500, 8 approximately? 9 A. Yes. 10 Q. Do you recall between January '07 11 and March '07 over \$200,000 being paid to 12 Hotel 71? 13 A. Yes, that's what it shows. 14 Q. Do you recall that? 15 A. I don't know what that -- you would 16 have to ask the accounting department how that 17 works. 18 Q. Did you -- I'm sorry. 19 A. You would have to ask accounting. 20 You would have to ask Bill Cygnor. 21 Q. Do you recall any services provided 22 by Royal Palm Hotel to Hotel 71? 23 A. I know that they did payroll or 24 they -- it was managed by West Paces and I know 25 that they had a certain way that certain things</p>	<p style="text-align: right;">Page 323</p> <p>1 Mitchell 2 were done and charged back one another through 3 West Paces, so -- but I don't know the details. 4 I was never involved in that part of it. 5 Q. Okay. If you flip to the May '07 6 balance sheet -- 7 A. Right. 8 Q. The second page of that sheet is 9 Bates stamped RP 011262. Do you see the 10 current liability in line 2009 for Mitchell 11 Hotel Group? 12 A. Which one is this? 13 MR. HAVELES: The May. Why don't 14 you undo the clip so it's easier. 15 A. Okay. 16 Q. Do you see that line item for 17 Mitchell Hotel Group LLC? 18 (Document review.) 19 A. Yes. 20 Q. Do you understand that to be the 21 same liability as the one previously listed as 22 Guy Mitchell accounts payable? 23 A. That's all -- that was all handled 24 through accounting. I don't know how that -- I 25 don't know the details.</p>
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<p style="text-align: right;">Page 324</p> <p>1 Mitchell 2 Q. Who handled accounting for Mitchell 3 Hotel Group LLC? 4 A. Peter Jonas. 5 Q. Who is Peter Jonas? 6 A. He is the accountant. 7 Q. What firm is he with? 8 MR. HAVELES: You could answer. 9 A. He is -- Peter Jonas is his 10 accounting firm. I don't know the name. 11 Q. If you could turn to the October '07 12 balance sheet, please. 13 MR. HAVELES: What page do you want 14 to look at? 15 Q. The second page, which is Bates 16 stamped RP 011265. Do you see on line 2012 17 under Current Liabilities -- 18 A. Yes. 19 Q. -- the Falor MSD Group, liability of 20 almost -- just shy of \$14,000? 21 A. Yes. 22 Q. Do you know what that liability 23 represents? 24 A. No idea. 25 Q. Was the Breakwater also managed by TSG Reporting - Worldwide 877-702-9580 </p>	<p style="text-align: right;">Page 325</p> <p>1 Mitchell 2 West Paces? 3 A. Not to my knowledge. I don't know. 4 Q. Could you take a look at the 5 February '08 balance sheet, which is Bates 6 stamped RP 001462. 7 A. Okay. 8 Q. Do you see under Other 9 Receivables -- 10 MR. HAVELES: The first page. 11 Q. It's the first page. It says 12 Breakwater A/R? 13 A. Yes. 14 Q. Approximately \$122,000? 15 A. Yes. 16 Q. Do you know what that account 17 receivable involves? 18 A. No. 19 MR. GREANEY: Can I enter this, 20 please, as exhibit -- Mitchell Exhibit 28. 21 (Mitchell Exhibit 28, Royal Palm 22 Hotel spread sheet, marked for 23 identification.) 24 Q. Have you seen this document before, 25 Mr. Mitchell? TSG Reporting - Worldwide 877-702-9580 </p>
<p style="text-align: right;">Page 326</p> <p>1 Mitchell 2 A. Yes. 3 Q. When did you see it? 4 A. Today. 5 Q. What is your understanding of what 6 this document is? 7 A. It's a repayment of loans to 8 Mitchell Hotel Group. 9 Q. Do you know who prepared this 10 document? 11 A. The receiver. 12 Q. Were you involved in the preparation 13 of this document? 14 A. No. 15 MR. HAVELES: I will represent to 16 you that none of us saw it until it was 17 submitted in connection with papers filed 18 with the court Sunday afternoon. 19 Q. Do you have any reason to believe 20 that there was not a transfer of a total of 3 21 point -- approximately \$3.8 million from the 22 Royal Palm Hotel to Mitchell Hotel Group 23 between February 29th, 2008 and May 15th, 2008? 24 A. No. 25 Q. Do you know why that money was TSG Reporting - Worldwide 877-702-9580 </p>	<p style="text-align: right;">Page 327</p> <p>1 Mitchell 2 transferred? 3 A. Repayment of loan. 4 Q. And was that the same loan that we 5 looked at as a current liability for the hotel 6 on some of the balance sheets? 7 A. That was included on the balance 8 sheets. 9 Q. Are there any written agreements 10 between Mitchell Hotel Group and Royal Palm 11 Hotel Property LLC? 12 A. No. 13 Q. Are there any written agreements 14 between you as an individual and Royal Palm 15 Hotel Property LLC? 16 A. No. 17 Q. Did you instruct anyone to transfer 18 the moneys as indicated on this chart? 19 A. Yes. 20 Q. Who did you instruct? 21 A. Accounting department. 22 Q. Who in the accounting department? 23 A. Bill Cygnor. 24 Q. Do you recall any discussions with 25 him about this? TSG Reporting - Worldwide 877-702-9580 </p>

<p style="text-align: right;">Page 328</p> <p>1 Mitchell</p> <p>2 A. No.</p> <p>3 Q. Do you recall what you said when you</p> <p>4 spoke to him?</p> <p>5 MR. HAVELES: You can answer the</p> <p>6 question.</p> <p>7 A. No.</p> <p>8 Q. Did you have any e-mails with him</p> <p>9 about these transfers?</p> <p>10 A. No.</p> <p>11 Q. Did you instruct him separately with</p> <p>12 respect to each transfer?</p> <p>13 A. Possibly.</p> <p>14 Q. Do you recall how many times you</p> <p>15 spoke to him in the last three or four months</p> <p>16 regarding transfer of money from the Royal Palm</p> <p>17 Hotel to Mitchell Hotel Group?</p> <p>18 A. No.</p> <p>19 Q. Is it more than five?</p> <p>20 A. I don't recall.</p> <p>21 Q. Did Mr. Cygnor ask you any questions</p> <p>22 during those conversations about the transfers?</p> <p>23 A. No.</p> <p>24 Q. Did you explain to him why the</p> <p>25 transfers should be made?</p>	<p style="text-align: right;">Page 329</p> <p>1 Mitchell</p> <p>2 A. Just the fact that they are</p> <p>3 repayments of loan.</p> <p>4 Q. Do you recall when the loan was</p> <p>5 made?</p> <p>6 A. They were made throughout the</p> <p>7 inception of the loan.</p> <p>8 Q. And I think we went over this</p> <p>9 before, but do you recall any of the reasons</p> <p>10 why loans were made from Mitchell Hotel Group</p> <p>11 to Royal Palm Hotel Property LLC?</p> <p>12 A. I don't recall the exact. When the</p> <p>13 hotel needed money, I funded it.</p> <p>14 Q. Is Mitchell Hotel Group LLC subject</p> <p>15 to the receiver order?</p> <p>16 A. I believe it is.</p> <p>17 Q. Is the receiver in control of</p> <p>18 Mitchell Hotel Group LLC?</p> <p>19 A. I don't know. That's a legal</p> <p>20 question. I don't -- I don't know.</p> <p>21 Q. Do you still manage and operate</p> <p>22 Mitchell Hotel Group LLC?</p> <p>23 A. Again, that's a legal question that</p> <p>24 I don't -- I don't understand the --</p> <p>25 Q. Are you in control of the bank</p>
<p style="text-align: right;">TSG Reporting - Worldwide 877-702-9580</p>	<p style="text-align: right;">TSG Reporting - Worldwide 877-702-9580</p>

<p style="text-align: right;">Page 330</p> <p>1 Mitchell</p> <p>2 accounts of Mitchell Hotel Group LLC?</p> <p>3 MR. HAVELES: Presently?</p> <p>4 MR. GREANEY: Presently.</p> <p>5 A. Again, I don't -- you know, I don't</p> <p>6 know how to answer that question.</p> <p>7 Q. Well, who are the members of</p> <p>8 Mitchell Hotel Group LLC?</p> <p>9 A. I don't actually have the details of</p> <p>10 that, the corporate --</p> <p>11 Q. Are you a member?</p> <p>12 A. Yes.</p> <p>13 Q. Are you a member with your wife?</p> <p>14 A. I don't know.</p> <p>15 Q. Has Mitchell Hotel Group LLC paid</p> <p>16 any money from it to its investors since</p> <p>17 February 29th, 2008?</p> <p>18 A. Mitchell Hotel Group received</p> <p>19 reimbursements, but I don't know -- that's it.</p> <p>20 MR. HAVELES: He is asking you has</p> <p>21 Mitchell Hotel Group paid money out to any</p> <p>22 of its investors since --</p> <p>23 THE COURT REPORTER: I can't hear</p> <p>24 you.</p> <p>25 MR. HAVELES: He is asking whether</p>	<p style="text-align: right;">Page 331</p> <p>1 Mitchell</p> <p>2 Mitchell Hotel Group paid money out to any</p> <p>3 of its investors since February 2008.</p> <p>4 A. I still don't understand the</p> <p>5 question.</p> <p>6 Q. Has Mitchell Hotel Group LLC paid</p> <p>7 any money to anyone since February 29th, 2008?</p> <p>8 A. It received money, right.</p> <p>9 Q. That wasn't my question. Has it</p> <p>10 paid any money to anyone since February 29th,</p> <p>11 2008?</p> <p>12 A. I really don't know how to answer</p> <p>13 that question.</p> <p>14 MR. HAVELES: Let's take a break,</p> <p>15 please.</p> <p>16 THE VIDEOGRAPHER: The time is</p> <p>17 12:14. We are going off the record.</p> <p>18 (Recess was taken from 12:14 to</p> <p>19 12:16.)</p> <p>20 THE VIDEOGRAPHER: The time is</p> <p>21 12:16. We are back on the record.</p> <p>22 MR. HAVELES: I believe the pending</p> <p>23 question which Mr. Mitchell answered is</p> <p>24 whether Mitchell Hotel Group has paid any</p> <p>25 money out to anyone since February 28,</p>
<p style="text-align: right;">TSG Reporting - Worldwide 877-702-9580</p>	<p style="text-align: right;">TSG Reporting - Worldwide 877-702-9580</p>

<p style="text-align: right;">Page 332</p> <p>1 Mitchell 2 2008. Is that correct? 3 MR. GREANEY: February 29th, 2008. 4 MR. HAVELES: February 29th, 2008. 5 You may answer the question, 6 Mr. Mitchell. 7 A. Yes. 8 Q. To whom? 9 A. To me. 10 Q. In what amount? 11 A. In the amount that would probably be 12 on the repayment sheet. 13 Q. What was the purpose of that payment 14 from Mitchell Hotel Group to yourself? 15 A. It's a repayment of loans. 16 Q. Did you make loans to Mitchell Hotel 17 Group? 18 A. Yes. 19 Q. What was the purpose of those loans? 20 A. To fund the Royal Palm deficits and 21 shortfalls. 22 Q. Do you have anyone providing 23 accounting services to you personally? 24 A. Yes. 25 Q. Who is that?</p>	<p style="text-align: right;">Page 333</p> <p>1 Mitchell 2 A. Peter Jonas. 3 Q. Do you have anyone providing you 4 with financial advisory services? 5 A. No. 6 Q. Do you have an understanding of your 7 current net worth? 8 A. No. 9 Q. Do you have a positive net worth? 10 A. I don't -- I don't know. 11 Q. You don't know whether you have a 12 positive net worth or not? 13 MR. HAVELES: He just said that. 14 Q. Do you know the amount of your 15 assets? 16 A. No. 17 Q. Do you know the amount of your 18 outstanding liabilities? 19 A. No. 20 Q. Have you or any of the LLCs in which 21 you hold a membership interest filed for 22 bankruptcy? 23 A. Yes. 24 Q. Which ones? 25 A. The Atlanta shopping centers.</p>
<p>TSG Reporting - Worldwide 877-702-9580</p>	<p>TSG Reporting - Worldwide 877-702-9580</p>

<p style="text-align: right;">Page 334</p> <p>1 Mitchell 2 Q. Any others? 3 A. Hotel 71. 4 Q. Any others? 5 A. No. 6 Q. Have you filed for bankruptcy? 7 A. No. 8 Q. How much is the outstanding 9 judgement owed by you to Hotel 71? 10 MR. HAVELES: You mean to the mezz 11 lender of Hotel 71? 12 MR. GREANEY: Yes. 13 A. 50 million. 14 Q. Have you disputed the judgement 15 pursuant to which that amount was awarded? 16 MR. HAVELES: Objection to form. 17 A. Yeah, I don't -- the attorneys 18 handled that stipulation. 19 Q. Do you dispute that you owe that 20 money? 21 A. I dispute I owe the money. 22 MR. HAVELES: I believe that there 23 is a stipulation -- there was a stipulation 24 entered only as to the amount of the 25 judgement, but there is a notice of appeal</p>	<p style="text-align: right;">Page 335</p> <p>1 Mitchell 2 that has been filed as to the judgement by 3 counsel representing Mr. Mitchell and 4 others in that case. 5 MR. GREANEY: With respect to 6 liability? 7 MR. HAVELES: I believe so. 8 Q. If you could go back to Mitchell 28, 9 please. Did you -- did Royal Palm Hotel 10 transfer money to Mitchell Hotel Group prior to 11 February 29th, 2008? 12 A. Yes. 13 Q. Do you know how much? 14 A. Prior to February 29th? No. 15 Q. Are you aware of any documents 16 evidencing loans made by Mitchell Hotel Group 17 to the Royal Palm Hotel other than the balance 18 sheet we looked at? 19 A. I'm not aware. 20 Q. Are you aware of any documents 21 evidencing loans from you personally to the 22 Royal Palm Hotel other than the balance sheets 23 we looked at today? 24 A. It would be by wire transfer or the 25 way it was loaned to the hotel.</p>
<p>TSG Reporting - Worldwide 877-702-9580</p>	<p>TSG Reporting - Worldwide 877-702-9580</p>

<p style="text-align: right;">Page 336</p> <p>1 Mitchell 2 Q. Are you aware of any promissory 3 notes executed -- 4 A. No. 5 Q. -- in connection with those loans? 6 No? 7 A. No. 8 Q. Are you aware of any loan 9 agreements? 10 A. No. 11 Q. Are you aware of any documents 12 evidencing loans from you personally to 13 Mitchell Hotel Group LLC? 14 A. They were booked through accounting. 15 Q. Through the accounting records of 16 Mitchell Hotel Group LLC? 17 A. Through my accountant and the hotel 18 accountant. 19 Q. I think you mentioned earlier that 20 the payments from Mitchell Hotel Group to 21 yourself in the period February 29, 2008 to May 22 15, 2008 were in repayment of debts that 23 Mitchell Hotel Group LLC owed to you; is that 24 correct? 25 A. Yes.</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p style="text-align: right;">Page 337</p> <p>1 Mitchell 2 Q. Are there any documents evidencing 3 those debts? 4 A. It would be through wire transfers 5 and loans to the hotel. 6 Q. Do you know where those documents 7 are? 8 A. In the accountant's office. 9 Q. That's Peter Jonas? 10 A. Yes. 11 MR. GREANEY: Can I take a 12 couple-minute break and see -- 13 MR. HAVELES: Absolutely. 14 MR. GREANEY: -- whether I have 15 anything further. 16 Go off the record, please. 17 THE VIDEOGRAPHER: The time is 18 12:23. We are going off the record. 19 (Recess was taken from 12:23 to 20 12:28.) 21 THE VIDEOGRAPHER: The time is 22 12:28. We are back on the record. 23 BY MR. GREANEY: 24 Q. Mr. Mitchell, what did you do with 25 the money that Mitchell Hotel Group paid to <p style="text-align: right;">TSG Reporting - Worldwide 877-702-9580</p> </p>
<p style="text-align: right;">Page 338</p> <p>1 Mitchell 2 you? 3 A. I put it in a bank account. 4 Q. Do you still hold that money now? 5 A. No. 6 Q. Who holds it now? 7 A. It's in a trust. 8 Q. A trust for whose benefit? 9 A. It's a family trust. 10 Q. And where is that trust located? 11 A. In the Cook Islands. 12 Q. And when was that money deposited 13 into the trust? 14 A. I don't know the dates or times that 15 it was done. 16 Q. And did you handle that yourself or 17 was that handled for you by someone? 18 A. That was done a while back. 19 MR. HAVELES: He asked by whom. 20 THE WITNESS: Oh. 21 MR. HAVELES: Did you do it or did 22 someone else do it for you? 23 A. Rephrase the question so I 24 understand it. 25 Q. Did you make the deposits from your</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p style="text-align: right;">Page 339</p> <p>1 Mitchell 2 accounts into the trust or did someone do that 3 for you? 4 A. I did. 5 Q. And how did you accomplish that? 6 A. By wire. 7 Q. You said it was some time ago. My 8 understanding is that we were talking right now 9 about the specific payments indicated on 10 Exhibit 28. 11 A. Right. 12 Q. Is that what you are talking about? 13 A. That's correct, yes. 14 Q. So when you say "some time ago," 15 what do you mean? 16 A. Payments were made to the trust 17 previously and now. 18 Q. So prior to February 29th and then 19 also since February 29th? 20 A. Yes. 21 Q. In roughly the amounts indicated on 22 this sheet, \$3.8 million? 23 MR. HAVELES: In total or just 24 recently? 25 MR. GREANEY: Just recently.</p> <p style="text-align: right;">TSG Reporting - Worldwide 877-702-9580</p>

<p style="text-align: right;">Page 340</p> <p>1 Mitchell</p> <p>2 A. Less than that.</p> <p>3 Q. What did you do with the remainder</p> <p>4 of the money?</p> <p>5 A. Spent.</p> <p>6 Q. Did you pay your legal bills with</p> <p>7 that money?</p> <p>8 A. I'm sure.</p> <p>9 Q. How much did you retain that wasn't</p> <p>10 paid to the trust?</p> <p>11 A. I don't -- I don't recall.</p> <p>12 Q. Do you have a lawyer advising you</p> <p>13 with respect to the trust?</p> <p>14 MR. HAVELES: You may answer that</p> <p>15 yes or no.</p> <p>16 A. Yes.</p> <p>17 Q. Who is that lawyer?</p> <p>18 MR. HAVELES: You may answer that</p> <p>19 question.</p> <p>20 A. Howard Rosen.</p> <p>21 Q. What firm is Howard Rosen with?</p> <p>22 A. Rosen & Rosen.</p> <p>23 Q. Where is that located?</p> <p>24 A. Coral Gables, Florida.</p> <p>25 Q. Do you have an accountant that helps</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p style="text-align: right;">Page 341</p> <p>1 Mitchell</p> <p>2 you with the administration of the trust?</p> <p>3 A. I don't know that answer.</p> <p>4 Q. Does Peter Jonas assist you with the</p> <p>5 trust?</p> <p>6 A. I don't know the answer to that</p> <p>7 question. The attorney, you know, has filed</p> <p>8 the papers and I'm sure Peter Jonas will be --</p> <p>9 you know, handles the --</p> <p>10 Q. Who is the executor of the trust?</p> <p>11 MR. HAVELES: You mean the trustee?</p> <p>12 Q. I mean the trustee.</p> <p>13 A. I don't know the details.</p> <p>14 Q. Who set up the trust for you?</p> <p>15 A. Howard Rosen.</p> <p>16 Q. Do you know which members of your</p> <p>17 family are beneficiaries of the trust?</p> <p>18 A. Not the details, no.</p> <p>19 Q. Do you know any of the individuals</p> <p>20 who are beneficiaries?</p> <p>21 A. No, I don't know the details of how</p> <p>22 the trust is structured and set up. It's a</p> <p>23 family trust for estate planning.</p> <p>24 Q. Did you direct that the trust be set</p> <p>25 up?</p> <p>TSG Reporting - Worldwide 877-702-9580</p>
<p style="text-align: right;">Page 342</p> <p>1 Mitchell</p> <p>2 A. Yes.</p> <p>3 Q. And at the time you did that, who</p> <p>4 did you have in mind as beneficiary of the</p> <p>5 trust?</p> <p>6 A. My family.</p> <p>7 Q. Which is who?</p> <p>8 A. My wife.</p> <p>9 Q. Any else?</p> <p>10 A. I don't know. See, you are asking</p> <p>11 things that I don't understand the corporate</p> <p>12 structure. When you say "beneficiary," I don't</p> <p>13 know --</p> <p>14 MR. HAVELES: Right now he is asking</p> <p>15 is there anyone else besides your wife who</p> <p>16 is a member of your family.</p> <p>17 A. I can't recall on how it was set up,</p> <p>18 the will and so forth, so -- the trust.</p> <p>19 Q. Mr. Mitchell, do you have anything</p> <p>20 that you feel you need to add to your testimony</p> <p>21 from today to make it complete and accurate?</p> <p>22 A. No.</p> <p>23 Q. Okay. Do you recall anything now</p> <p>24 that you couldn't remember earlier in the day?</p> <p>25 A. No.</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p style="text-align: right;">Page 343</p> <p>1 Mitchell</p> <p>2 Q. And do you have anything you want to</p> <p>3 clarify or change from your prior testimony?</p> <p>4 A. No.</p> <p>5 MR. GREANEY: I don't have any</p> <p>6 further questions for you.</p> <p>7 MR. HAVELES: I have one question on</p> <p>8 cross.</p> <p>9 EXAMINATION BY</p> <p>10 MR. HAVELES:</p> <p>11 Q. Mr. Mitchell, earlier today</p> <p>12 Mr. Greaney asked you some questions about the</p> <p>13 sale of the marketing of the property by</p> <p>14 Easdil. Do you recall that?</p> <p>15 A. Yes.</p> <p>16 Q. And you recall you advised him in</p> <p>17 one of your answers that you were concerned</p> <p>18 about confusion due to litigation with respect</p> <p>19 to the impact on the marketing of the property?</p> <p>20 A. That's correct. That's correct.</p> <p>21 Q. Okay. Could you explain what you</p> <p>22 meant by confusion due to the litigation having</p> <p>23 an effect on the marketing of property?</p> <p>24 A. Basically it has to do with the</p> <p>25 receivership of who actually has control of the</p> <p>TSG Reporting - Worldwide 877-702-9580</p>

<p style="text-align: right;">Page 344</p> <p>1 Mitchell 2 property, whether it's the receiver or myself, 3 and that's what's -- you know, that's created 4 confusion as well. 5 MR. HAVELES: I have no other 6 questions of the witness. 7 MR. GREANEY: I don't have any 8 further. 9 THE VIDEOGRAPHER: The time is 10 12:33. This is the end of today's 11 deposition. We are going off the record. 12 (Time noted: 12:31 p.m.)</p> <p>13</p> <p>14</p> <p>15 -----</p> <p>16 GUY T. MITCHELL</p> <p>17</p> <p>18 Subscribed and sworn to before me 19 this day of 2008.</p> <p>20</p> <p>21 -----</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p style="text-align: right;">Page 345</p> <p>1</p> <p>2 C E R T I F I C A T E</p> <p>3</p> <p>4 STATE OF NEW YORK) 5) ss.: 6 COUNTY OF NASSAU)</p> <p>7</p> <p>8 I, KRISTIN KOCH, a Notary Public within 9 and for the State of New York, do hereby 10 certify: 11 That GUY T. MITCHELL, the witness 12 whose deposition is hereinbefore set forth, 13 was duly sworn by me and that such 14 deposition is a true record of the 15 testimony given by such witness. 16 I further certify that I am not 17 related to any of the parties to this 18 action by blood or marriage; and that I am 19 in no way interested in the outcome of this 20 matter.</p> <p>21 IN WITNESS WHEREOF, I have hereunto 22 set my hand this 11th day of June, 2008.</p> <p>23 -----</p> <p>24 KRISTIN KOCH, RPR, RMR, CRR, CLR</p> <p>25</p> <p>TSG Reporting - Worldwide 877-702-9580</p>																																																			
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2 ERRATA SHEET FOR THE TRANSCRIPT OF:
3 Case Name: Mitchell v. Carbon Capital
4 Dep. Date: June 10, 2008
5 Deponent: Guy T. Mitchell

5 CORRECTIONS:

6 Pg. Ln. Now Reads Should Read Reason

7 _____
8 _____
9 _____
10 _____
11 _____
12 _____
13 _____
14 _____
15 _____
16 _____
17 _____
18 _____
19 _____

20 Signature of Deponent
21 SUBSCRIBED AND SWORN BEFORE ME
22 THIS ____ DAY OF _____, 2008.

23
24
25 (Notary Public) MY COMMISSION EXPIRES: _____
TSG Reporting - Worldwide 877-702-9580

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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:
GUY T. MITCHELL and ROYAL PALM SENIOR :
INVESTORS, LLC, :
:
Plaintiffs, :
: Index No. 08 Civ. 4319 (JES)
v. :
:
CARBON CAPITAL II, INC., :
:
Defendant. :
:
----- x

**INVOLUNTARY PLAINTIFF ROYAL PALM SENIOR INVESTORS, LLC'S
MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANT CARBON CAPITAL II, INC.'S MOTION TO DISMISS**

Phillip Shatz
McCabe & Mack LLP
63 Washington Street
P.O. Box 509
Poughkeepsie, New York 12602-0509
Telephone: (845) 486-6800

*Attorneys for Involuntary Plaintiff
Royal Palm Senior Investors, LLC*

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Involuntary Plaintiff Royal Palm Senior Investors, LLC (“RPSI”) respectfully submits this memorandum of law in opposition to the motion by Defendant Carbon Capital II, Inc. (“Carbon”) to dismiss RPSI’s claims.

PRELIMINARY STATEMENT

This lawsuit concerns Carbon’s efforts to establish that it is the owner of the 100% membership interest Royal Palm Senior Investors, LLC (“RPSI”) has in Royal Palm Hotel Property, LLC (“RPHP”) (the “Collateral”). The Settlement Agreement relied upon by Carbon does not comply with the procedures and rules in the New York Uniform Commercial Code (“UCC”). The Settlement Agreement was executed by Mitchell while he was a defendant in the New York state court lawsuit entitled *Hotel 71 Mezz Lender, L.L.C. v. Falor, et al.*, No. 601175/07 (Ramos, J.) (the “*Hotel 71 v. Mitchell* State Action”).

Carbon’s basic position is that it did not have to follow the procedures set forth in UCC Section 9-620 to accept collateral in full or partial satisfaction of a debt because Carbon received the conveyance of the Collateral without giving *any value at all*. Carbon claims that because it took the Collateral without any credit to the debtor, the UCC does not apply to it. Carbon’s position – that the conveyance allegedly effected by the Settlement Agreement is valid *because* it gave RPSI nothing for its interest in RPHP – is hollow.

Carbon also seeks to dismiss RPSI’s adequately pleaded fraudulent conveyance claims under New York’s Debtor & Creditor Law Sections 273-a and 276. Carbon moves to dismiss these fraud claims before the parties have engaged in discovery and despite the fact that, among other things, RPSI has pleaded that the Settlement Agreement was entered into with fraudulent intent and inadequate consideration. RPSI’s Pleading ¶¶ 89-90, 99-101.

Carbon seeks to mask its conduct by taking flatly inconsistent positions depending on the forum and audience in its effort to somehow “shoehorn” its conduct into a remedy permitted by the UCC. For example, in the New York state court action entitled *Hotel 71 Mezz Lender, L.L.C. v. Carbon Capital II, Inc.*, No. 601720/08 (Ramos, J.) (the “*Hotel 71 v. Carbon* State Action”) Carbon asserted in its opposition to Hotel 71 Mezz Lender, L.L.C.’s (“Hotel 71”) Order to Show Cause seeking a preliminary injunction

that it “merely took possession” of the Collateral. At other times, including in pleadings filed in this Court as well as in numerous writings sent to RPSI and to Hotel 71, Carbon claims to own the Collateral. Carbon’s document, the Settlement Agreement, does not purport to give Carbon “mere possession” of the inchoate Collateral; it purports to *convey* the Membership Interest to Carbon. *See* Declaration of Nicholas P. Crowell, served July 18, 2008 (“Crowell Decl.”), Ex. 3 (Settlement Agreement §§ 3.2, 6.2.2).

FACTUAL BACKGROUND

I. The Hotel 71 v. Mitchell State Action And The Appointment Of The Honorable Albert M. Rosenblatt As Receiver

On October 23, 2007, in connection with the *Hotel 71 v. Mitchell* State Action, the State Court authorized the sheriff to levy on Mitchell (as manager or as manager of the manager) to attach, pursuant to CPLR § 6201, his interests in various LLCs, including Royal Palm Senior Investors, LLC and Royal Palm Hotel Property, LLC. Affirmation of Phillip Shatz, dated August 1, 2008 (“Shatz Affirm.”), Ex. 1 (Order of Attachment). On March 26, 2008, the State Court granted Plaintiff’s motion to appoint former New York Court of Appeals Judge Albert M. Rosenblatt as receiver (the “Receiver” or “Receiver Rosenblatt”) over all of the personal property of Mitchell (and the other judgment debtors), including all of the contractual rights and membership interests that Mitchell owns in certain limited liability companies and other entities. *See* Shatz Affirm., Ex. 2 and 3 (orders dated April 2 and April 4, 2008 (collectively, the “Receivership Orders”)). Involuntary Plaintiff’s Notice of Appearance, Response to Pleadings, and Claims (“RPSI’s Pleading”) ¶ 30. On April 21, 2008, the State Court entered judgment in the amount of \$52 million against Mitchell and four of the other defendants in that suit. *Id.* ¶ 28. Receiver Rosenblatt has taken over the management of the Royal Palm Hotel (the “Royal Palm” or the “Hotel”), stopped the diversion of millions of dollars of cash out of the Hotel into Mitchell’s accounts and is attempting to maximize the value of the Hotel in order to sell it in a commercially reasonable manner for the benefit of all creditors – including Carbon.

II. Carbon’s Loan To Royal Palm Senior Investors, LLC

On February 18, 2005, RPSI executed a promissory note made payable to Carbon evidencing a

mezzanine loan Carbon made to RPSI in the initial principal amount of \$24.5 million. *Id.* ¶ 36. Carbon and Mitchell entered into a Settlement Agreement on October 24, 2007 – one day *after* Mitchell was served in New York with the Attachment Order in the *Hotel 71 v. Mitchell* State Action, which, among other things, applied to “any interest any of the Defendants[, including Mitchell,] may have in” RPSI and RPHP. *Id.* ¶ 37. Mitchell signed the Settlement Agreement as Manager on behalf of RPSI and as an individual guarantor. *Id.* ¶ 38.

On March 25 and April 1, 2008, Carbon sent RPSI letters notifying RPSI that Carbon had deemed RPSI in default of the Settlement Agreement. *Id.* ¶ 40. Carbon now claims to own 100% of RPSI’s interest in the Royal Palm Hotel by virtue of sending these letters pursuant to the Settlement Agreement, without any further legal process, foreclosure sale, or notice to any other party. *Id.* ¶¶ 41-42. The UCC requires, however, that the debtor actually accept – *after default* – the secured party’s proposal to accept the collateral in satisfaction of the debt, and the debtor’s acceptance must be authenticated after the default. Carbon never obtained Mitchell’s consent after it sent the March 25 and April 1 default letters. Carbon’s own pleadings acknowledge that Mitchell and RPSI rejected Carbon’s efforts to seize control. *Id.* ¶ 45. The Settlement Agreement expressly waived any prior defaults “that would not have a material adverse impact on [RPSI’s] ability to perform under the terms of this Agreement.” Crowell Decl., Ex. 3 (Settlement Agreement § 3.4). The Settlement Agreement further provided that Carbon “waives, on a going forward basis, the covenant to pay all amounts due and payable under the Note as and when due and payable, other than the obligation to repay the Debt in its entirety on the Revised Maturity Date,” and that, also on a “going forward basis,” Carbon waives “as against [RPSI], only, any default or Event of Default that may now or hereafter occur solely on the part of Robert D. Falor or Geoffrey L. Hockman under the terms of the Guaranty.” *Id.* (Settlement Agreement §§ 3.4.1, 3.4.2).

UCC Section 9-620 provides the *only* method whereby a secured creditor may accept collateral in satisfaction of a debt. Admitting that it did not even attempt to comply with the UCC, Carbon maintains that ownership of Collateral was conveyed to it “automatically.” As Carbon’s counsel frankly stated at a State Court hearing on June 16, 2008 (the “June 16 Hearing”), Carbon and Mitchell had no intention of

following UCC Section 9-620's process, “[s]o none of the things you need to do to accept collateral in partial or full satisfaction of the loan exists.” Shatz Affirm., Ex. 4 at 41:8-17. With consistent audacity, Carbon contends that its debt remains fully intact despite its supposed ownership of the Collateral. *See id.* at 41:18-23. In short, Carbon failed to comply with Section 9-620 of the UCC – it did not make a proposal to accept collateral in satisfaction of its debt and it did not secure any agreement after Carbon sent the March 25 and April 1 default notices.

III. Carbon Has Taken Inconsistent Positions Regarding The Collateral

Carbon simultaneously takes two entirely inconsistent positions with respect to the Collateral. On the one hand, Carbon improperly declares itself the owner of 100% of the Collateral through an “automatic” process not permitted by the UCC. At the same time, Carbon declares that it is entitled to foreclose on the Collateral *as collateral* and sell it at a UCC foreclosure sale as a creditor. The Collateral at issue here is the 100% membership interest that RPSI has in Royal Palm Hotel Property, LLC, which is the LLC that holds the deed to the physical Royal Palm Hotel (the Royal Palm Hotel itself is *not* the Collateral). All the while, a real estate broker, Eastdil Secured, LLC, has been attempting to sell the Royal Palm Hotel, previously at Mitchell’s and RPSI’s direction and now at Receiver Rosenblatt’s direction. As evidenced by a recent article in *The Deal* stating that “The [Royal Palm Hotel] is on the block, although it isn’t clear who owns it” and further that “exactly who owns the Royal Palm is in dispute” because an “affiliate of BlackRock Inc. [*i.e.* Carbon], which holds a loan for the property it says is in default, wants control,” but “Mitchell has resisted” and “[l]awsuits have flown,” Carbon’s inconsistent positions have confused the marketplace and frustrated the sales efforts. RPSI’s Pleading ¶¶ 60-61; *see* Shatz Affirm. ¶ 4, Ex. 5.

Before this Court, Carbon claims that it only took “possession” of the Collateral. *See* Defendant’s Memorandum of Law in Support of Its Motion to Dismiss Plaintiff Royal Palm Senior Investors, LLC’s Claims, dated July 18, 2008 (“Carbon Motion to Dismiss”) at 2 (“Carbon merely took possession of the Collateral”); *see also* Shatz Affirm., Ex. 4 at 43:5-9. Carbon does not explain how it has gained possession of the inchoate Membership Interests, “possession” of which is impossible, and

irrelevant even if it were possible.

However, at every other opportunity, Carbon asserts, consistent with the language of Section 3.2 of the Settlement Agreement, that it is the sole owner of the Collateral and entitled to sole ownership of any surplus. Carbon claims that the Settlement Agreement allows Carbon to retain, under various circumstances, the *entire surplus* from any sale of the Collateral. Crowell Decl., Ex. 3 (Settlement Agreement at § 3.2). Carbon stated to RPSI on April 1, 2008 that “99.9% of Royal Palm’s membership interest was automatically conveyed to Carbon II and Carbon II is now the managing member of Royal Palm Hotel Property, LLC.” Shatz Affirm., Ex. 6. Similarly, Carbon has also asserted in its pleadings in this Court that “99.9% of [RPSI’s] membership in the Royal Palm Hotel was automatically conveyed to Carbon,” and that RPSI’s “remaining 0.1% membership interest in the Royal Palm Hotel was automatically conveyed to Carbon” as well. Carbon Answer and Counterclaims at 13, ¶ 34. In State Court, Carbon even claimed an interest in the entire surplus only moments after alleging that it only took possession. Shatz Affirm., Ex. 4 at 66:17-21.

Simply put, Carbon attempts to distract this Court from its unmistakable claims that it took title to the Collateral and arrogated to itself any surplus. Carbon clearly hopes that by minimizing its egregious conduct and recasting it as “merely [taking] possession,” it can somehow avoid all the requirements of the UCC and misappropriate the surplus.

IV. The Agreement Reached At The June 16 Hearing

The State Court heard oral argument on Hotel 71’s motion for a temporary restraining order on June 16, 2008 in connection with the *Hotel 71 v. Carbon* State Action, and Carbon then acknowledged that it does, in fact “want the hundred percent,” its counsel stating that “I want it so that I can sell it under the UCC. That is what the forbearance agreement was all about.” Shatz Affirm., Ex. 4 at 65:26-66:3. Justice Ramos recognized at the June 16 Hearing that Carbon could not simply take the surplus that a sale

of the Royal Palm Hotel might yield above the amount Carbon is owed.¹ Nevertheless, when asked by Justice Ramos about the surplus later in the proceedings, Carbon continued to press its argument that it somehow has a claim to the surplus.²

Ultimately, the parties reached an agreement at the June 16 Hearing that Receiver Rosenblatt would be responsible for selling the Royal Palm Hotel. In facilitating this agreement, the Court explained that, “in the process of selling it, if we can calm the collateral issue and get it sold effectively, with everybody on board, as far as to how it’s to be sold and what is to be done in terms of the proceeds, and then fight about it later, then it is just money.” *Id.* at 60:18-24. Carbon’s counsel agreed that Receiver Rosenblatt would handle the sale of the Royal Palm Hotel, stating at the June 16 Hearing, “I am perfectly comfortable with Judge Rosenblatt selling [the] property, provided that we are going forward on a[] tight schedule to get it sold.” *Id.* at 67:5-8. And, at the close of the June 16 Hearing, when Hotel 71’s counsel noted that he wanted “to make sure that there’s not going to be a UCC sale notice now that Judge Rosenblatt,” not Carbon, was to sell the Royal Palm Hotel, Carbon’s counsel stated, “We could not even if we wanted to. Judge Sprizzo has enjoined us from doing just that. We would not do that without coming to your Honor first anyway.” *Id.* at 77:10-17.

¹ The State Court explained this at the June 16 Hearing in an exchange with Hotel 71’s counsel:

MR. WEIGEL: There’s still a surplus. They’re claiming that they have somehow they have eliminated that surplus.

THE COURT: They can’t.

MR. WEIGEL: Exactly, your Honor.

THE COURT: It has to be – everything has to be in good faith. You cannot defeat the judgment. Shatz Affirm., Ex. 4 at 35:14-21.

² The State Court asked Carbon’s counsel to “assume there’s a surplus after your obligation . . . what happens?”, to which Carbon’s counsel responded, “Well, we can fight about that under the settlement agreement.” Shatz Affirm., Ex. 4 at 66:17-21.

ARGUMENT

I. The Standard of Review

Carbon moves to dismiss the RPSI's claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a cause of action. Carbon fails to meet its heavy burden under this provision. Carbon's motion should be denied.

Rule 8(a)(2) of the Federal Rules of Civil Procedure "requires only a 'short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007) (*quoting Conley v. Gibson*, 355 U.S. 41, 47 (1957)). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations," the factual allegations "must be enough to raise a right to relief above the speculative level." *Id.* at 1964-65. "Once a claim has been adequately stated, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id.* at 1969. Of course, when "applying this standard, a district court must accept the allegations contained in the complaint as true and draw all reasonable inferences in favor of the nonmoving party." *Bausch & Lomb Inc. v. CIBA Vision Corp.*, No. 07-CV-6575-CJS, 2008 WL 2827541, at *2 (W.D.N.Y. July 21, 2008).

II. RPSI Has Pleaded Carbon's Failure To Comply With Numerous Provisions Of UCC Article 9

RPSI has stated claims that Carbon failed to comply with UCC Sections 9-620, 9-621, and 9-624. RPSI's Pleading ¶¶ 39-50, 71-86. Indeed, Carbon has admitted that it did not proceed in accordance with the UCC's provisions regarding the acceptance of collateral in satisfaction of an obligation. Carbon expressly stated at the June 16 Hearing that "none of the things you need to do to accept collateral in partial or full satisfaction of the loan exists." Shatz Affirm., Ex. 1 at 41:15-17. Carbon's attempt to collect more than the amount of its debt violates the well-settled common law rule that "at no time before or after default may the creditor take the collateral for the debt and thus forfeit the debtor's surplus value or equity in the collateral." *Indianapolis Morris Plan Corp. v. Karlen*, 28 N.Y.2d 30, 35 (N.Y. 1971); *see*

Maher v. Alma Realty Co., Inc., 417 N.Y.S.2d 748, 749 (2d Dep’t 1979); *Peugh v. Davis*, 96 U.S. 332, 337 (1877). Section 9-620 of the UCC provides the only lawful path to effectuate transfers of collateral in satisfaction of an obligation owed to a secured party, and Carbon admits it did not follow that provision.

As a matter of law, the Settlement Agreement did not effect a valid transfer to Carbon of title to the Royal Palm and RPSI’s interests in RPHP. The purported “conveyance” to Carbon, by its express terms, continued to secure payment of the same debt that Carbon claims RPSI remains obligated to pay. Any such transfer to an existing creditor without fair consideration – or, as here, no consideration whatsoever – is simply void under common law. *See Indianapolis Morris Plan Corp.*, 28 N.Y.2d at 35.

Nor can the Settlement Agreement be validated as a remedy under Article 9 or under any other doctrine under New York law. First, Carbon made no attempt to comply with any UCC rules governing “disposition” of collateral. Second, even if the Settlement Agreement is tested “*post hoc*” for validity under the UCC, a review of the statutory requirements for a retention by a secured party in partial or total satisfaction of the debt demonstrates the complete absence of any of the steps that the UCC mandates be followed. Most notably, despite the purported transfer of property worth millions more than is owed to Carbon, the debt owed to Carbon was not reduced, in whole or in part. RPSI’s Pleading ¶ 49, 73-74. This precludes any contention by Carbon that Carbon somehow retained its collateral in satisfaction of the “Obligations” secured thereby as required under Sections 9-620 and 9-621 of the UCC. At the June 16 Hearing, Carbon confirmed that the Collateral was not taken in satisfaction of RPSI’s debt:

THE COURT: When does Carbon contend that the collateral was turned over in full satisfaction of the loan, prior to perfection of the judgment?

MR. GREANEY: It never was turned over in full satisfaction. That is my point.

Shatz Affirm., Ex. 4 at 41:18-23.

A. RPSI Is An “Aggrieved Person” And Has Standing to Raise Carbon’s Noncompliance With Article 9

Section 9-625 – titled “Remedies for Secured Party’s Failure to Comply with Article” – expressly provides: “If it is established that a secured party is not proceeding in accordance with this article, a court

may order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions.” UCC § 9-625(a). The Official Comment makes crystal clear who is entitled to seek relief: “Subsections (a) and (b) provide the basic remedies afforded to *those aggrieved* by a secured party’s failure to comply with this Article” and “under subsection (a) an *aggrieved person* may seek injunctive relief.” *Id.*, Cmt. 2 (emphasis added). Here, RPSI is an “aggrieved person” within the meaning of the UCC. *See* UCC § 1-201(2) (defining “Aggrieved party” as “a party entitled to resort to a remedy”). Moreover, injunctive relief is “of particular importance when it is applied prospectively before the unreasonable disposition has been concluded.” *In re Enron Corp.*, No. 01-16034, 2005 WL 3873890, at *10 n.14 (Bankr. S.D.N.Y. June 16, 2005) (quoting comment to predecessor section of § 9-625).

Here, RPSI is entitled to injunctive relief pursuant to Section 9-625(a) because Carbon has clearly failed to proceed in accordance with UCC Sections 9-602, 9-620, 9-621, 9-623, and 9-624. RPSI’s Pleading ¶¶ 39-50, 71-86.

B. RPSI Has Stated A Claim That Carbon Failed To Comply With UCC Sections 9-620 and 9-621 In Three Distinct Ways

Carbon acknowledges that it did not follow any “of the things you need to do to accept collateral in partial or full satisfaction of the loan.” Shatz Affirm., Ex. 4 at 41:8-17. In fact, Carbon failed to comply with UCC Section 9-620 in three distinct ways: (1) the Settlement Agreement does not provide for any reduction of borrower RPSI’s debt as required by Sections 9-620(a) and (c); (2) RPSI did not sign or otherwise authenticate any offer by Carbon to accept the Collateral in full or partial satisfaction after the March 25 and April 1, 2008 default notices as required by Section 9-620(c); and (3) Carbon made no attempt to notify the requisite parties pursuant to Section 9-620(d) and Section 9-621. RPSI’s Pleading ¶¶ 39-50, 71-86. Under Section 9-602, the debtor cannot “waive or vary the rules” mandated by Sections 9-620 and 9-621. *See* UCC § 9-602(j).

1. There Was No Proper Satisfaction Under UCC Sections 9-620(a) and (c)

UCC Section 9-620 expressly provides that “a secured party may accept collateral in full or partial satisfaction of the obligation it secures *only if*: (1) the debtor consents to the acceptance under

subsection (c).” UCC § 9-620(a)(1) (emphasis added). Subsection (c) of Section 9-620 is equally straightforward. With respect to partial satisfaction, “a debtor consents to an acceptance of collateral in partial satisfaction of the obligation it secures *only if* the debtor agrees to the terms of the acceptance in a record authenticated *after* default.” UCC § 9-620(c)(1) (emphasis added). As for full satisfaction, “a debtor consents to an acceptance of collateral in *full* satisfaction of the obligation it secures *only if* the debtor agrees to the terms of the acceptance in a record authenticated *after* default” or where the secured party sends to the debtor *after* default a proposal regarding the collateral to which the debtor does not object. UCC § 620(c)(2) (emphasis added). Moreover, as the statute expressly states, Section 9-620’s procedure is the *only* lawful procedure whereby a secured party may accept collateral in satisfaction of a debt. The proposal contemplated by Section 9-620(c) “need not take any particular form as long as it sets forth the terms under which the secured party is willing to accept collateral in satisfaction.” UCC § 9-620, Cmt. 4 (further explaining that a “proposal to accept collateral should specify the amount (or a means of calculating the amount, such as by including a per diem accrual figure) of the secured obligations to be satisfied, state the conditions (if any) under which the proposal may be revoked, and describe any other applicable conditions”).

Here, there is no satisfaction, whether partial or total, intended by the Settlement Agreement. Neither the Settlement Agreement nor Carbon’s March 25 and April 1, 2008 notices endeavor to set forth *any* terms under which Carbon was willing to accept the Collateral in satisfaction of RPSI’s debt. RPSI’s Pleading ¶¶ 40-43, 47. Moreover, Carbon nowhere states how much of RPSI’s debt Carbon’s purported taking of the Collateral satisfies, and Carbon confirmed at the June 16 Hearing that no satisfaction of RPSI’s debt occurred. Shatz Affirm., Ex. 4 at 41:18-23. Accordingly, Carbon plainly failed to comply with Section 9-620’s satisfaction requirements, and no transfer of ownership interests in the Collateral

from RPSI to Carbon occurred.³

Section 9-620's Official Comment states that a "debtor's voluntary surrender of collateral to a secured party and the secured party's acceptance of possession of the collateral does not, of itself, necessarily raise an implication that the secured party intends or is proposing to accept the collateral in satisfaction of the secured obligation." UCC § 9-620, Cmt. 5. And, although Carbon relies on this comment to argue that RPSI has failed to state a claim under Section 9-620 because RPSI purportedly "agreed to voluntarily relinquish possession of the Collateral," *see* Carbon Motion to Dismiss Brief at 10, Carbon completely leaves aside the fact that RPSI *expressly refused* to accept Carbon's taking of RPSI's interests in RPHP. RPSI's Pleading ¶¶ 45-46.

Carbon's actions here are not limited to mere "acceptance of possession." Carbon does not merely claim that it took possession of the Collateral in preparation for a commercially reasonable UCC sale. Carbon claims that it now *owns* 100% of the Collateral and that it has no obligation to pay over any surplus to RPSI's other creditors and owners. RPSI's Pleading ¶¶ 39, 41. Indeed, Carbon has held itself out to the world – and indeed to this Court – as *both* a creditor in possession who aims to sell the Royal Palm and, *simultaneously*, as the owner of the Collateral. RPSI's Pleading ¶¶ 41, 56. Carbon cannot, therefore, shield itself from the requirements of UCC Section 9-620. Carbon's reliance on *Long Island Trust Co. v. Porta Aluminum, Inc.*, 49 A.D.2d 579, 370 N.Y.S.2d 166 (2d Dep't 1975) and *Coxall v. Clover Commercial Corp.*, 4 Misc. 3d 654, 781 N.Y.S.2d 567 (Civ. Ct. 2004), is misplaced because, although those decisions recognize that a secured party may take possession of collateral after a default, neither decision purports to overturn the rule set forth in *Indianapolis Morris Plan* that "at no time before or after default may the creditor take the collateral for the debt and thus forfeit the debtor's surplus value

³ UCC Section 9-622 governs the effect of a secured party's proper acceptance of collateral in satisfaction of a debt under Article 9, and it provides that a "secured party's acceptance of collateral in full or partial satisfaction of the obligation it secures: (1) discharges the obligation to the extent consented to by the debtor" and "(2) transfers to the secured party all of a debtor's rights in the

[Footnote continued on next page]

or equity in the collateral.” 28 N.Y.2d at 35.

Moreover, it is well-settled New York law that a party who materially breaches a contract cannot then enforce that contract against the other party because one party’s material breach excuses the other party from its obligations under the contract. *See, e.g., Net2Globe Int’l, Inc. v. Time Warner Telecom of N.Y.*, 273 F. Supp. 2d 436, 456-57 (S.D.N.Y. 2003). Under the Settlement Agreement, Carbon agreed to pay the Royal Palm Hotel’s monthly mortgage payments for the months of October, November and December 2007 and the month of January 2008. RPSI’s Pleading ¶ 52. Carbon, however, failed to make any of these payments in breach of its obligations under the Settlement Agreement. *Id.* ¶ 53. This material breach forecloses Carbon’s ability to seek any benefits under the Settlement Agreement.

2. RPSI Expressly Refused To Consent To Carbon’s Taking After Default And Thus There Was No Acceptance Under Section 9-620

UCC Section 9-620(a) requires that the debtor consent to the secured party’s acceptance of the collateral in satisfaction of the debt it owes to the secured party *after default*. As RPSI has alleged, Carbon did not make an effort to accept Collateral in satisfaction of its debt after default and RPSI did not accept or authenticate any such offer. RPSI’s Pleading ¶ 44, 50. Indeed, as Carbon itself has admitted, RPSI *expressly refused* to agree, after the alleged defaults, that Carbon could take the Collateral. *Id.* ¶ 45. This is not surprising given that Carbon claims that it did not even satisfy one dollar of RPSI’s debt when it supposedly took the Collateral. *Id.* ¶ 43.

On March 25, 2008, Carbon sent RPSI a “Termination Event Letter” claiming that RPSI had defaulted on certain obligations under the Settlement Agreement. Shatz Affirm., Ex. 7; *see also* RPSI’s Pleading ¶ 40. The Termination Event Letter further declared that Carbon “has the right to foreclose its Collateral pursuant to Section 4.3 of the Settlement Agreement.” Shatz Affirm., Ex. 7. Carbon has since claimed that, as a result of the defaults outlined in the Termination Event Letter, Carbon “automatically

[Footnote continued from previous page]

collateral.” UCC § 9-622(a)(1)-(2). Thus, only a valid acceptance of the collateral pursuant to Article 9’s process works a transfer to the secured party of the debtor’s interests in the collateral.

replaced [RPSI] as the managing member of the Royal Palm Hotel, 99.9% of [RPSI's] membership in the Royal Palm Hotel was automatically conveyed to Carbon," and, "for the reasons set forth in the Termination Event Letter, [RPSI's] remaining 0.1% membership interest in the Royal Palm Hotel was automatically conveyed to Carbon" as well. Carbon Answer and Counterclaims at 13, ¶ 34; *see RPSI's Pleading ¶¶ 39, 45.*

Then, on April 1, 2008, Carbon's counsel sent another letter to RPSI stating that, due to RPSI's "failure to either pay to Carbon II the outstanding principal, interest and fees *set forth in the Settlement Agreement*, or cause the sale of the Royal Palm Hotel, or refinance the Loan, Carbon II was now the managing member of the Royal Palm Hotel, and 99.9% of [RPSI's] membership interest in the Royal Palm Hotel had been automatically conveyed to Carbon II." Carbon Answer and Counterclaims at 13, ¶ 36 (emphasis added); *see RPSI's Pleading ¶ 45.* The April 1, 2008 letter "further requested that Mitchell, on behalf of [RPSI], execute an enclosed Assignment and Transfer of Membership Interest and cooperate in the execution of any other documents that Carbon II may request to confirm or evidence the transfer of membership interest and management." Carbon Answer and Counterclaims at 13, ¶ 37.

RPSI, however, refused to consent. RPSI's Pleading ¶ 45. Carbon acknowledged that Mitchell continued to hold RPSI out as the managing member of the Royal Palm Hotel. *Id.* ¶ 46. Put simply, Carbon failed to obtain the required consent after the supposed default by Mitchell and RPSI under the Settlement Agreement.

Carbon now argues that the Settlement Agreement itself – entered into months before the March 25, 2008 and April 1, 2008 default letters were issued – somehow provides the requisite "consent after default" by RPSI. This argument is wrong for at least three reasons. First, as Carbon itself has previously explained in its pleadings in this Court and in the State Court, Carbon's April 1, 2008 letter was sent to notify RPSI that, due to RPSI's "failure to either pay to Carbon II the outstanding principal, interest and fees *set forth in the Settlement Agreement*, or cause the sale of the Royal Palm Hotel, or refinance the Loan, Carbon II was now the managing member of the Royal Palm Hotel, and 99.9% of [RPSI's] membership interest in the Royal Palm Hotel had been automatically conveyed to Carbon II." Carbon

Answer and Counterclaims at 13, ¶ 36 (emphasis added); *see RPSI's Pleading ¶ 45.* In order to satisfy UCC Section 9-620, Carbon must therefore obtain RPSI's consent to a transfer of the Collateral in an authenticated record after RPSI's March 25, 2008 default *under the Settlement Agreement.* Indeed, the Settlement Agreement waived all prior defaults so the loan was not in default at the time the Settlement Agreement was signed. The default notice letters refer to RPSI's breach of its obligations *under the Settlement Agreement.* RPSI's Pleading ¶ 40; Crowell Decl., Ex. 3 (Settlement Agreement § 3.4); Shatz Affirm., Ex. 6, 7.

Second, as alleged, RPSI did not consider the Settlement Agreement as providing such consent, as demonstrated by the fact that, in response to Carbon's March 25 and April 1, 2008 notices of default, RPSI took the position that its interests in RPHP had *not* automatically transferred to Carbon. RPSI's Pleading ¶¶ 45-46.

Third, based on its actions after RPSI's default under the Settlement Agreement, *Carbon itself* did not view the Settlement Agreement as the authenticated record providing RPSI's consent to the transfer of Collateral. As noted, the April 1, 2008 letter "requested that Mitchell, on behalf of [RPSI], execute an enclosed Assignment and Transfer of Membership Interest and cooperate in the execution of any other documents that Carbon II may request to confirm or evidence the transfer of membership interest and management." Carbon Answer and Counterclaims at 13, ¶ 37. Of course, if Carbon viewed the Settlement Agreement as the requisite authenticated record embodying RPSI's consent to the transfer of the Collateral, the "Assignment and Transfer of Membership Interest" and "any other documents that Carbon II may request to confirm or evidence the transfer of membership interest and management" would be superfluous. Thus, given that at the time neither RPSI nor Carbon viewed the Settlement Agreement as providing RPSI's requisite consent to the transfer under the UCC, Carbon should not now be heard to argue that it served that purpose.

3. RPSI Has Stated A Claim That Carbon Failed to Provide The Notice Required Under UCC Sections 9-620(d) and 9-621

Carbon makes no effort in its dismissal papers to argue that it complied with the UCC's notice

requirements. Carbon does not claim that any party, let alone Hotel 71, ever received the notice it was entitled to receive under Article 9 of Carbon’s purported attempt to accept the Collateral. *See* RPSI’s Pleading ¶¶ 78-81. For this reason alone Carbon’s motion to dismiss should be denied.

The effectiveness of a secured party’s acceptance under Section 9-620 of collateral in satisfaction of a debt turns on whether the secured party provided notice of its intended actions to the proper parties pursuant to Section 9-621. *See* UCC §§ 9-620(d), 9-621. Section 9-621(a) “specifies three classes of competing claimants to whom the secured party must send notification of its proposal: (i) those who notify the secured party that they claim an interest in the collateral, (ii) holders of certain security interests and liens who have filed against the debtor, and (iii) holders of certain security interests who have perfected by compliance with statute (including a certificate-of-title statute), regulation, or treaty described in Section 9-311(a).” UCC § 9-621, Cmt. 2. As the drafters of the UCC noted, “this section contains no ‘safe harbor,’ which excuses an enforcing secured party from notifying certain secured parties and other lienholders” because “Section 9-620 permits the debtor and secured party to set the amount of credit the debtor will receive for the collateral subject only to the requirement of good faith.”⁴ *Id.* The importance of proper notification in the context of Section 9-620 is, thus, further heightened, and the “holder of a security interest who is entitled to notification under this section but does not receive it has the right to recover under Section 9-625(b) any loss resulting from the enforcing secured party’s noncompliance with this section.” *Id.*

Carbon made no effort to inform any other entity of its intention to appropriate the Collateral from RPSI. RPSI’s Pleading ¶¶ 78-81. To the contrary, though Carbon knew of Hotel 71’s interest no later than January 9, 2008 when it received a subpoena from Hotel 71, Carbon concealed its efforts to take

⁴ For reasons explained throughout this brief, Carbon has repeatedly not acted in good faith. Carbon’s failure to proceed in good faith here not only amounts to a violation of New York’s fraudulent conveyance laws, but also runs afoul of “a basic principle running throughout” the UCC, *i.e.*, that “[e]very contract or duty within this Act imposes an obligation of good faith in its performance or

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the Collateral. RPSI's Pleading ¶ 81.

Carbon appeared before the State Court at a March 26, 2008 hearing in the *Hotel 71* action regarding the appointment of Receiver Rosenblatt and knew of Hotel 71's interest in the Hotel and the various Royal Palm entities when it sent its letter to RPSI on April 1, 2008, in which Carbon claimed that the Collateral had been "automatically conveyed" to Carbon. RPSI's Pleading ¶ 42. Carbon's March 25, 2008, letter to RPSI declared that it "has the right to foreclose its Collateral," but it was not until its April 1, 2008, letter to RPSI, *after* the March 26 hearing held by the State Court at which Carbon appeared, that Carbon declared that the Collateral had been "automatically conveyed" to Carbon." Carbon Answer and Counterclaims at 13, ¶ 37; Shatz Affirm., Ex. 2, 3. Carbon cannot claim that it was unaware of Hotel 71's interest in the Collateral.

Rather than disclose its intention to take all of the Collateral, Carbon included a confidentiality provision in its Settlement Agreement with RPSI that barred the parties from disclosing, except in certain circumstances, "the terms or conditions of this Agreement or any document executed in connection herewith." RPSI's Pleading ¶ 81; Crowell Decl., Ex. 3 (Settlement Agreement at § 10.14.). Carbon's failure to notify Hotel 71 – a party with a financial interest in the Hotel – is another failure to comply with Article 9, specifically Sections 9-620(d) and 9-621. RPSI's Pleading ¶ 81.

C. The Settlement Agreement Is Merely A Disguised Security Device

Section 9-109(a)(1) provides that UCC Article 9 applies to "a transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract," and, as the Official Comment makes clear, "all consensual security interests in personal property and fixtures are covered by this Article, except for transactions excluded by subsections (c) and (d)." UCC § 9-109(a)(1), Cmt. 2. Moreover, when a security interest is created, Article 9 "applies *regardless of the form of the transaction*"

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enforcement." UCC § 1-203 & Cmt. Indeed, as the State Court stated at the June 16 Hearing: "everything has to be in good faith." Shatz Affirm., Ex. 4 at 35:19-20.

or the name that parties have given to it.” *Id.* (emphasis added); *see also* UCC § 9-102(73) (defining the term “Security agreement” in part as “an agreement that creates or provides for a security interest”).

Thus, any purported conveyance of the Collateral under the Settlement Agreement by its lawful and beneficial owner to Carbon if the debt owed to Carbon was not paid in full by March 31, 2008, is merely a disguised security device, not a valid transfer of beneficial ownership. *See* UCC § 9-109(a)(1), Cmt. 2; *see also In re Schwab*, 347 B.R. 726, 738 (Bankr. D. Nev. 2006) (stating in connection with UCC § 9-109 that “Article 9 looks to substance over form”). Although drafted as a conveyance, there can be no doubt that the Settlement Agreement is a security device because the purported transfer of the Collateral only was to occur if the debt owed to Carbon had not been paid. The Settlement Agreement here, therefore, was merely a security device providing Carbon with at most a security interest in the Collateral, and a breach of the Settlement Agreement cannot result in Carbon obtaining equitable title to the Collateral. Thus, as a matter of law, Carbon could have at most a security interest in the Collateral, not ownership. In addition, not only is any transfer of any interest in the Collateral under the Settlement Agreement to Carbon void as a fraudulent conveyance and by virtue of Section 9-109, but there is a substantial issue as to whether any remaining security interest Carbon had in the Collateral merged out of existence at the point in time it improperly sought to vest title to the Collateral in itself.

D. The Settlement Agreement Works An Improper Waiver Of RPSI's Equitable Right Of Redemption And Carbon Failed To Comply With The Redemption Procedure Of Section 9-624(c)

Carbon’s attempt to collect more than the amount of its debt violates the well-settled common law rule that “at no time before or after default may the creditor take the collateral for the debt and thus forfeit the debtor’s surplus value or equity in the collateral.” *Indianapolis Morris Plan Corp.*, 28 N.Y.2d at 35; *see Maher*, 417 N.Y.S.2d at 749. The UCC establishes the process whereby the debtor may waive its right to redeem its surplus equity. Section 9-624(c) provides that the waiver may “only” be accomplished by an agreement “entered into and authenticated *after* default.” UCC § 9-624(c) (emphasis added). That did not happen here.

Carbon again argues that the Settlement Agreement itself provides the requisite consent required

by UCC Section 9-624, but, for the reasons outlined in Section II(B)(2), *supra*, the Settlement Agreement served no such purpose. The Settlement Agreement makes no reference to Section 9-624. Crowell Decl., Ex. 3. Further, RPSI *expressly refused* to consent to waive its right of redemption after Carbon alleged that RPSI defaulted under the Settlement Agreement (RPSI's Pleading ¶¶ 45, 77, 85), and Section 9-620 requires such consent to work an effective transfer under Section 9-622. Carbon's purported taking of 100% of RPSI violates the common law rule set forth long ago in *Peugh v. Davis*, 96 U.S. 332, 337 (1877).

Moreover, although UCC Section 9-610(b) requires that “[e]very aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable,” Carbon’s actions here have been commercially *unreasonable*. UCC Section 9-602 provides that the debtor cannot “waive or vary the rules” mandated by Section 9-610(b).⁵ UCC § 9-602(g). Carbon’s actions also violate the rule that a secured party may not purchase collateral of this type through a private sale. *See* UCC § 9-610(c). Indeed, Carbon does not even purport to purchase the Collateral; it gave no consideration in the Settlement Agreement other than allowing Mitchell to continue to use the Royal Palm as his own personal piggy bank for six months, and then Carbon, in effect, gifted the Collateral to itself through RPSI’s default under a private, secret agreement. Carbon simply cannot lawfully do this. *See id.* (“A secured party may purchase collateral . . . at a private disposition only if the collateral is of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations.”).

III. The Purported Conveyance To Carbon Of RPSI’s Interests In The Collateral Is Fraudulent

Contrary to Carbon’s unsupported arguments, Plaintiff has stated a claim for both an actual and constructive fraudulent conveyance under New York Debtor & Creditor Law §§ 273-a and 276.

A. RPSI's Debtor & Creditor Law Section 273-a Claim

1. RPSI Has Adequately Pleaded A Section 273-a Claim

Carbon attempts to assert that its fraudulent conveyance is shielded from this Court because (1) it “was not Mitchell, but RPSI that conveyed the membership interests,” and “RPSI was not a defendant in the Hotel 71 action,” thus RPSI cannot allege “that it was a defendant in an action for money damages or that a judgment in such action had been docketed against it”; and (2) “RPSI has not alleged that a final judgment has been rendered against it that remains unsatisfied.” Carbon Motion to Dismiss at 15.

Carbon overlooks the well-settled rule of New York law that, in actions to void a fraudulent conveyance, “substance will not give way to form,” and “technical considerations will not prevent substantial justice from being done.” *Orr v. Kinderhill Corp.*, 991 F.2d 31, 35 (2d Cir. 1993). Courts have explained that the “facts are not to be atomized. Where a transfer is only a step in a general plan, the plan must be viewed as a whole with all its composite implications,” and a “clear pattern of purposeful conduct will support a finding of actual intent to defraud.” *In re Checkmate Stereo and Electronics, Ltd.*, 9 B.R. 585, 612-13 (Bankr. E.D.N.Y. 1981) (internal quotation marks omitted); *see Gafco, Inc. v. H.D.S. Mercantile Corp.*, 47 Misc.2d 661, 665 (N.Y.C. Civ. Ct. 1965) (explaining that “mere adroitness of technique should not be permitted to obscure the real facts” because “[w]hether a transaction constitutes a fraudulent transfer must be determined from its intent and effect and not from its form; a court will look at the results and not at the devious ways by which they were accomplished”). Carbon argues that this Court should ignore the fact that Mitchell directly caused the fraudulent transfer to Carbon – in contravention of New York courts’ long-standing recognition that, because fraudulent conveyances can take an infinity of forms, the mere existence of a cunning form will not defeat a valid claim.

Carbon’s argument elevates form over substance in contravention of settled New York law.

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⁵ Indeed, Section 9-602 also bars the debtor from waiving the requirements of Section 9-615(f) regarding the procedures for allocating the proceeds and surplus proceeds from a disposition of the

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Mitchell clearly effected the Settlement Agreement between RPSI and Carbon. RPSI's Pleading ¶ 65.

Mitchell signed the Settlement Agreement in his capacity as member-manager of RPSI. RPSI's Pleading ¶ 38. Mitchell was and is the majority shareholder in RPSI. Accordingly, RPSI has stated a claim to void the Settlement Agreement as a fraudulent conveyance effected by *Mitchell* that conveyed *Mitchell's property* in a manner that violated New York Debtor & Creditor Law Section 273-a (as well as Section 276, as explained *infra*). Carbon cites no case to the contrary.⁶

2. RPSI Has Adequately Pleaded The Fraudulent Conveyance Was Made For Less Than Fair Consideration

Carbon next argues that RPSI has not adequately pleaded that the conveyance lacked adequate consideration. Carbon Motion to Dismiss at 15. Under Section 273-a of the Debtor and Creditor Law, a conveyance made for less than fair consideration while a lawsuit is pending is conclusively deemed fraudulent if judgment is entered and returned unsatisfied. *See Matter of Russo*, 1 B.R. 369, 378-79 (Bankr. E.D.N.Y. 1979). (“The legislature intended to give creditors an additional weapon to set aside a conveyance made without fair consideration, by a debtor who was a defendant in an action for money damages if he failed to satisfy the judgment. It created an irrebuttable presumption of fraudulent intent irrespective of the grantor’s solvency or his actual intent.”). Carbon does not contest that at all relevant times Mitchell was a defendant in the *Hotel 71 v. Mitchell* State Action. Nor does Carbon claim that Hotel 71’s judgment has been satisfied.

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collateral. *See UCC § 9-602(h).*

⁶ The Receiver has standing to assert fraudulent conveyance claims under the Debtor & Creditor Law because he has not only assumed the management interests of RPSI, but he is also the Receiver of a creditor, Hotel 71. *See Eberhard v. Marcu*, 530 F.3d 122, 132-33 (2d Cir. 2008) (“We agree with the Seventh Circuit’s analysis and hold that a receiver’s standing to bring a fraudulent conveyance claim will turn on whether he represents the transferor only or also represents a creditor of the transferor,” and where the receiver represents a creditor as well as the transferor, the receiver has standing.) (*quoting Scholes v. Lehmann*, 56 F.3d 750, 752-55 (7th Cir. 1995) (Posner, J.) (“The appointment of the receiver removed the wrongdoer from the scene. The corporations were no more Douglas’s [the controlling individual of the corporations] evil zombies. Freed from his spell they became entitled to

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Carbon did not give adequate consideration. RPSI's Pleading ¶¶ 94-95. Carbon claims that, as a matter of law, it provided adequate consideration for 100% of the membership interests in RPHP *without even discharging one dollar of RPSI's debt* to Carbon. Carbon is wrong. A transfer must satisfy "three elements to [be] 'fair consideration' under [the New York Debtor & Creditor Law]: first, the recipient of the debtor's property must either convey property or discharge an antecedent debt in exchange; second, the exchange must be for a fair equivalent; and third, the exchange must be 'in good faith.'" *In re Sharp Int'l Corp.*, 302 B.R. 760, 779 (E.D.N.Y. 2003); *see also Neshewat v. Salem*, 365 F. Supp. 2d 508, 519-20 (S.D.N.Y. 2005).

Carbon claims to have taken 100% of the membership interests in RPHP without even discharging one dollar of RPSI's debt to Carbon. Thus, this purported conveyance to Carbon was made for unfair consideration. *See Neshewat*, 365 F. Supp. 2d. at 520-21. In addition, the agreement was not made in good faith. RPSI's Pleading ¶ 101. The Settlement Agreement with Carbon – purporting to allow Carbon to take the entirety of RPSI's interest in the Royal Palm upon a default – was signed *the day after* Mitchell, the manager of RPSI, was served with the Order of Attachment in the *Hotel 71 v. Mitchell State Action*. RPSI's Pleading ¶ 37. Knowing that Hotel 71 was going to get the benefit of his interest in the Hotel, Mitchell used the time afforded by the Settlement Agreement to take approximately \$3.8 million and secret it in the Cook Islands. Shatz Affirm., Ex. 8 at 337:24-342:18. That is not "in good faith." *See Superior Leather Co., Inc. v. Lipman Split Co., Inc.*, 116 A.D.2d 796, 797, 496 N.Y.S.2d 845, 846 (3d Dep't 1986) (an "indispensable component of fair consideration is good faith on the part of the judgment debtor who makes a conveyance").

In its motion, Carbon makes the same meritless argument that it employed in the State Court at the June 16 Hearing, diverting attention from the provision that it added in the Settlement Agreement under which it claims to have the rights not only to repayment of its loan, but to the *entire surplus* from

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the return of the moneys . . . that Douglas had made the corporations divert to unauthorized

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the sale of the Collateral. Carbon claims that RPSI “conveyed nothing to Carbon that it had not already pledged as part of the original loan,” and that the “Settlement Agreement simply provided the mechanics for Carbon II to take possession of the Collateral in order to ensure that its eventual disposition proceeded in an orderly and expeditious manner.” Carbon Motion to Dismiss Brief at 16-17. Carbon does not even mention the provision of the Settlement Agreement, with no precursor in the Loan Agreement, that purports to allow Carbon to retain, under some circumstances, the *entire surplus* from any sale of the Collateral. Crowell Decl., Ex. 3 (Settlement Agreement at § 3.2). Carbon added this provision in the Settlement Agreement and now purports to be entitled to far more than its original loan with interest – and yet bewilderingly claims that it was entitled to the entire surplus under the original Loan Agreement.

Carbon’s claim is empty, and flatly contradicted by the documents, and Section 3.2 of the Settlement Agreement demonstrates – under the very cases Carbon relies on to argue that the consideration was fair – that the transaction lacked adequate consideration in light of Carbon’s claim to the entire surplus and its failure to reduce the debt owed to it. Carbon relies on *In re Silverman Laces, Inc.*, No. 01 Civ. 6209 (DC), 2002 WL 31412465 (S.D.N.Y. Oct. 24, 2002) (quoted in *In re AppliedTheory Corp.*, 330 B.R. 362, 364 (Bankr. S.D.N.Y. 2005)) in arguing that its decision to “forbear from immediately pursuing its remedies” and to “extend RPSI’s obligations under the Loan Agreement pursuant to the terms of the Settlement Agreement” constitutes fair consideration under the Debtor & Creditor Law. Carbon Motion to Dismiss at 16. Judge Chin reasoned in *In re Silverman Laces, Inc.* that the creditor’s waiver of “its rights to immediately pursue its remedies” and to “extend [the debtor’s] obligations” in return for a “security interest in [the debtor’s] inventory” was fair consideration in light of the fact that “[a]lthough the inventory was worth more than twice the amount of the debt [the debtor] owed to [the creditor, the creditor] could recover against the inventory only to the extent of [the debtor’s] defaulted obligations and thus any inventory beyond that would remain the [debtor’s] property.” *In re*

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purposes.”).

M. Silverman Laces, Inc., 2002 WL 31412465, at *6 (emphasis added). That the creditor was not entitled to collect more than the debtor's debt in the new agreement was critical to the finding of fair consideration, with the Court reiterating that the debtor "did not give up more than it received, for if [the creditor] foreclosed on the inventory, *it would not be entitled to the value of the entire inventory*," rather, it "would *only* be entitled to the amounts due on the loans, and *the balance of the proceeds from a sale of the inventory would revert to*" the debtor. *Id.* (emphasis added).

B. RPSI Has Adequately Pleaded a Debtor & Creditor Law Section 276 Claim

RPSI has more than adequately alleged actual fraud under Section 276 of the Debtor & Creditor Law. RPSI's Pleading ¶¶ 68, 81, 99-101. Under Section 276, any transfer made with actual intent to hinder or delay creditors is deemed fraudulent. *See N.Y. Debtor & Creditor Law § 276* ("Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors."). Despite the fact that the allegations of the Complaint are taken as true for purposes of this motion to dismiss, Carbon claims that there is insufficient evidence of Mitchell and Carbon's actual fraudulent intent. Carbon is wrong. The Complaint plainly alleges actual fraudulent intent. RPSI's Pleading ¶¶ 68, 81, 99-101.

Due to the difficulty of proving actual intent to hinder, delay, or defraud creditors, New York law recognizes "badges of fraud," *i.e.*, circumstances so commonly associated with fraudulent transfers "that their presence gives rise to an inference of intent." *Pen Pak Corp. v. LaSalle Natl. Bank*, 240 A.D.2d 384, 386 (2d Dep't 1997) (quoting *MFS/Sun Life Trust-High Yield Series v. Van Dusen Airport Servs. Co.*, 910 F. Supp. 913, 935 (S.D.N.Y. 1995)). These "badges" include (1) inadequacy of consideration; (2) a transfer conducted in secrecy; (3) a transfer to an insider; and (4) a transfer during the pendency of litigation. *See Wall Street Assocs. v. Brodsky*, 257 A.D.2d 526, 529 (1st Dep't 1999).

The purported transfer to Carbon of RPSI's interests in the Collateral wears many badges of fraud. First, the consideration furnished by Carbon was clearly inadequate. RPSI Pleading ¶ 89. Second, the Settlement Agreement was a secret document with a confidentiality provision barring the parties from

disclosing, except in certain circumstances, “the terms or conditions of this Agreement or any document executed in connection herewith.” *Id.* ¶¶ 78, 80-81; Crowell Decl., Ex. 3 (Settlement Agreement at § 10.14.). Third, the transfer was to an insider, the senior mezzanine lender. RPSI’s Pleading ¶ 36. Fourth, the alleged transfer took place on October 24, 2007 – the day after Mitchell was served with the Order of Attachment and during the pendency of the *Hotel 71 v. Mitchell* State Action. *Id.* ¶ 37, 100. Thus, Carbon’s argument that these many badges of fraud are insufficient to survive a motion to dismiss is completely without merit.

Carbon’s reliance on *Dixie Yarns, Inc. v. Forman*, 906 F. Supp. 929 (S.D.N.Y. 1995), for its argument that RPSI’s Section 276 claim fails to adequately allege a lack of good faith is unavailing. There, in analyzing a Section 273-a claim (not a Section 276 claim, where the court explained that its Section 273-a analysis was informed by the statutory explanation of “fair consideration” in Section 272 of the Debtor & Creditor Law⁷), Judge Haight explained that “[b]ad faith is established as a matter of law” because the “Forman defendants were aware . . . that a major commercial claim was pending against the corporation,” they “commenced their withdrawals from [the corporation] very shortly thereafter,” and “months after this Court entered judgment on the award, the Forman defendants arranged to have account debtors of [the corporation] pay significant amounts to the individual defendants directly or to a company to which defendant Arthur Forman controlled.” *Dixie Yarns, Inc.*, 906 F. Supp. at 937. “Lastly,” the Court continued, “one month before [the corporation] ceased operations altogether, Arthur Forman caused [the corporation] to transfer to him all of the Company’s remaining inventory,” and, as here, the nature of the transaction is consistent with the pattern clearly established by the evidence adduced during discovery: a systematic acquisition by the Forman defendants of all of [the corporation’s] assets, with the consequence that [the corporation] is unable to make any payment on plaintiff’s judgment against it.

⁷ Section 272 of the Debtor & Creditor Law provides that “[f]air consideration is given for property, or obligation,” (a) when “in exchange for such property, or obligation, as a fair equivalent therefore, and in good faith, property is conveyed or an antecedent debt is satisfied, or,” (b) when “such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained.”

Id. (quoting *Orr v. Kinderhill Corp.*, Judge Haight noting, “I use the ‘pattern’ advisedly because, as the Second Circuit instructs in *Orr v. Kinderhill Corp.*, . . . ‘an allegedly fraudulent conveyance must be evaluated in context; where a transfer is only a step in a general plan, the plan must be viewed as a whole with all its composite implications’”). Just as in *Dixie Yarns, Inc.*, the pattern of activities here demonstrates the Settlement Agreement was not entered into in good faith.

CONCLUSION

For all of the foregoing reasons, Carbon’s motion to dismiss should be denied.

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Respectfully submitted,

By: 

Phillip Shatz
McCabe & Mack LLP
63 Washington Street
P.O. Box 509
Poughkeepsie, New York 12602-0509
Telephone: (845) 486-6800

*Attorneys for Involuntary Plaintiff
Royal Palm Senior Investors, LLC*